CERTAIN SELECT CASES IN LAW, REPORTED:

BY

Sir *EDWARD COKE*, Knight,

LATE

Lord CHIEF JUSTICE

OF

ENGLAND

And one of His Majesties Council of STATE.

The Second Edition.

With two Exact Tables, the one of the Cases, and the other of the Principal Matters therein contained.

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СЕРТИФИКАТ

на

ЛАЗЕР

Ф

TO THE READER.

READER,

IT may ſeem altogether an unneceſſary work to ſay any thing in the praiſe and vindication of that Perſon and his Labours, which have had no leſs than the generall approbation of a whole Nation convened in Parliament: For if King THEODORICK in *Caſſiodore* could affirm, *Neque enim dignus eſt à quopiam redargui qui noſtro judicio meretur abſolvi*, That no man ought to be reproved whom his Prince commends; How much rather then ſhould men forbear to cenſure thoſe and their Works which have had the greateſt allowance and atteſtation a Senate could give, and to acquieſce and reſt ſatisfied in that judgment? Such reſpect and allowance hath been given to the learned Works of the late Honourable and Venerable Chiefe Juſtice, Sir EDWARD COKE, whoſe Perſon in his life time was reverenced as an Oracle, and his Works (ſince his deceaſe) cited as Authentick Authorities, even by the Reverend Judges themſelves. The acceptance his Books (already extant) have found with all knowing Perſons, hath given me the confidence to commend to the publick view ſome Remains of his, under his own hand-writing, which have not yet appeared to the World, yet (like true and genuine Eaglets) are well able to behold and bear the light: They are of the ſame Piece and Woofe with his former Works, and in reſpect of their own native worth, and the reference they bear to their Authour, cannot

be too highly valued: Though, in reſpect of their quantity and number, the Reports are but few; yet, as the skilfull Jeweller will not loſe ſo much as the very filings of rich and precious metals; and the very fragments were commanded to be kept where a Miracle had been wrought, *Propter miraculi claritatem & evidentiam:* So theſe ſmall parcels, being part of thoſe vaſt and immenſe labours of their Authour, great almoſt to a Miracle (if I may be allowed the compariſon:) were there no other uſe to be made of them (as there is very much, for they manifeſt and declare to the Reader many ſecret and abſtruſe points in Law, not ordinarily to be met with in other Books ſo fully and amply related) deſerve a publication, and to be preſerved in the reſpects and memories of Learned men, and eſpecially the Profeſſors of the Law; and to that end they are now brought to light and publiſhed. If any ſhould doubt of the truth of theſe Reports of Sir EDWARD COKE, they may ſee the originall Manuſcript written with his own hand, at *Henry Twyford's* Shop in *Vine-Court Middle Temple.*

Farewell.

J. G.

MICH. AN. 6 JACOBI REGIS,
In the Common Pleas.

Willowes Caſe.

IN Treſpaſſe brought by Richard Stallon one of the Attorneys of the Court againſt Thomas Brayde (which began in Eaſter Term, An. 6 Jacobi Rot. 1845.) for breaking of his Houſe and Cloſe at Fenditton in the County of Cambridge; And the new Aſſignment was in an acre of Paſture: The Defendant pleads that the place where, &c. was the Land and Freehold of Thomas Willowes and Richard Willowes; and that he as Servant, &c. And the Plaintiff for Replication ſaith, that the place where, was parcell of the Mannor of Fenditton, and demiſable, &c. by Copy of Court-Roll in Fee-ſimple: And that the Lords of the Mannor granted the Tenements in which, &c. to John Stallon and his heirs, who ſurrendred them unto the ſaid Willowes, and Willowes, Lords of the ſaid Mannor, to the uſe of the Plaintiff and his heirs, who was admitted accordingly, &c. The Defendant doth rejoyn, and ſaith, That well and true it is, that the Tenements in which, &c. were parcell of the Mannor, and demiſable, &c. And the ſurrender and admittance ſuch, prout, &c. But the ſaid Thomas Brayde further ſaith, that the Tenements in which, &c. at the time of the Admiſſion of the ſaid Richard Stallon, were, and yet are of the clear yearly value of fifty three ſhillings and four pence; And that within the ſaid Mannor there is ſuch a Cuſtome, Quod rationabilis denariorum ſumma legalis monetæ Angliæ ſuper quamlibet admiſſionem cujuſlibet perſonæ, ſive quarumcunque perſonarum tenent. vel tenent. per Dom. vel Dominos manerii prædict. ſive per Seneſchallum, &c. ad aliquas terras ſive Tenementa Cuſtomaria Manerii prædict. ſecundum Conſuetudinem Manerii illius debetur & à tempore quo, &c. debitum fuit Dom. &c. tempore ejuſdem admiſſionis pro fine pro admiſſione illa, quod idem Dominus, vel iidem Dom. prædict. vel Seneſchallus ſuus Curiæ ejuſdem Manerii pro tempore exiſten. uſus fuit, vel uſi fuerunt per totum Tempus ſupradict. in plena Curia Manerii illius pro Admiſſione ejuſdem perſonæ, ſeu earundum perſonarum ſic facta, aſſidere & appunctuare, Anglice, to Aſſeſſe and appoint eandem rationabilem denariorum ſummam pro fine pro eadem Admiſſione ſic ut præfertur facta, nec non ſuperinde eandem denariorum ſummam ſic aſſeſſam & appunctuatam, præfatæ perſonæ ſive perſonis ſic admiſſæ ſive admiſſis, ſolveret & ſolverent, &c. eidem Domino, &c. prædictam rationabilem denariorum ſummam pro fine, pro Admiſſione ſua prædict. ſic aſſeſſam & appunctuat. And further ſaith, That the Steward of the ſaid Mannor, at a Court holden 1. Octob. in the fourth year of the Reign of the King that now is, admitted the Plaintiff to the Tenements, in which, &c. and aſſeſſed and ſet a reaſonable ſumm of money, that is to ſay, five pounds, ſix ſhillings, eight pence, that is to ſay, Valorem eorundem tenementorum per duos annos, & non ultra pro fine pro prædict.

Copyhold Fine reaſonable.

dict. Admiſſione prædict. Richard. Stallon to the ſaid Lords of the Mannor to be paid: And alſo the ſaid Steward at the ſame Court did give notice and ſignifie to the Plaintiff the ſaid ſumm was to be paid to the ſaid Lords of the Mannor, &c. And further ſaith, that the ſaid Willowes and Willowes, afterwards, that is to ſay, the ſecond day of November, in the fourth year aforeſaid, at Fendrton aforeſaid, requeſted the ſaid Richard Stallon to pay to them five pounds, ſix ſhillings, eight pence there, for the Fine for his admittance, &c. which the ſaid Rich. Stallon then and there utterly denied and refuſed, and as yet doth refuſe. By which the ſaid Richard Stallon forfeited to the aforeſaid Thomas and Richard Willowes all his Right, Eſtate, &c. of and in the Tenements aforeſaid in which, &c. The Plaintiff ſurjoyneth, and ſaith, that the ſaid ſumm of five pounds, ſix ſhillings, eight pence, &c. was not rationabilis finis, as the ſaid Thomas Brayde above hath alledged, &c. upon which the Defendant doth demur in Law. And in this Caſe theſe points were reſolved by Coke chief Juſtice, Walmſely, Warberton, Daniel, and Foſter Juſtices, 1. And principally, if the Fine aſſeſſed had been reaſonable, yet the Lords ought to have ſet a certain time and place when the ſame ſhould be paid, becauſe the ſame ſtands upon a point of forfeiture: As if a man bargains and aſſures Land to one and his heirs, upon condition that if he pay to the Bargainer or his heirs ten pounds at ſuch a place, that he and his heirs ſhall re-enter: In that caſe becauſe no time is limited, the Bargainor ought to give notice to the Bargainee, &c. when he will tender the money, and he cannot tender it when he pleaſeth, and with that agrees, 19 Eliz. Dyer 354. For a man ſhall not loſe his Land, unleſſe an expreſſe default be in him; and the Bargainee in ſuch Caſe is not tied to ſtay alwaies in the place, &c. So in the Caſe at Bar, the Copyholder is not tied to carry his Fine alwaies with him, when he is at Church, or at Plow, &c. And although that the Rejoynder is, that the Plaintiff refuſed to pay the Fine, ſo he might well do, when the requeſt is not lawfull nor reaſonable, for in all caſes when the requeſt is not lawfull nor reaſonable, the party may without prejudice deny the payment. And he who is to pay a great Fine, as a 100 l. or more, it is not reaſonable that he carry it alwaies with him in his Pocket, and preſently the Copyholder was not bound to it, becauſe that the Fine was uncertain & arbitrable, as it was reſolved in Hubbards Caſe in the fourth part of my Reports, amongſt the Copyhold Caſes. 2. It was reſolved, that although the Fine be incertain and arbitrable, yet it ought to be ſecundum arbitrium boni viri: And it ought to be reaſonable and not exceſſive, for all exceſſiveneſs is abhorred in Law, Exceſſus in re qualibet jure reprobatur Communi; For the Common Law forbids any exceſſive diſtreſſe, as it appeareth in 41 E. 3. 26. Where a man avowed the taking of ſixty Sheep for 3 d. Rent, and the Plaintiff prayed that he might be amerced for the Diſtreſſe: And the Court (who is alwaies the Judge whether the Diſtreſſe be reaſonable or exceſſive) held, that ſix Sheep had been a ſufficient Diſtreſſe for the ſaid Rent, and therefore he was amerced for ſo many of them as were above ſix Sheep: And the Court ſaid that if the Avowant ſhall have return, he ſhall have a return but of ſix Sheep: and this appeareth to be the Common Law; for the Statute of Articuli ſuper Chartas extends only where a grievous Diſtreſs is taken for the Kings Debt. See F.N.B. 174. a. and 27. Aſſ. 51. 28. Aſſ. 50. 11 H. 4. 2. and 8 H. 4. 16. &c. Non Capiatur gravis diſtrictio, &c. And ſo if an exceſſive or an unreaſonable Amerciament be impoſed in any

Vi. F.N.B. 82. a. reaſonable Aid incertain untill the Statute of Glanvi. lib. 9. fol. 70. 14 H. 4. 9. by Hill. 14 H. 4. 1. a.

Court

Court Baron or other Court which is not of Record, the party shall have Moderata Misericordia: And the Statute of Magna Charta is but an affirmance of the Common Law in such point. See F.N.B. 75. Nullus liber homo amercietur nisi secundum quantitatem delicti. And gravis Redemptio non est exigenda. And the Common Law gives an Assise of Sovient Distresse, and Multiplication of Distresse found, which is excessive, in respect of the multiplicity of vexation. And therewith agreeth 27. Ass. 50,51. Non Capiatur multiplex districtio, F.N.B. 178. b. And if Tenant in Dower hath Villains, or Tenants at Will who were rich, and he by excessive Tallages and Fines makes them poor and Beggers, the same is adjudged Wast. And therewith agreeth F.N.B. 61. b. 16 H. 3. Wast 135. and 16 H. 7. And see the Register Judiciall, fol. 25. b. Wast lieth, in exulando Hentcum, & Hermanum, &c. Villeios, Quorum quilibet tenet unum Messuagium & unam virgat. terræ, in Villagio in prædict' villa de T. by grievous and intolerable Distresses: By all which it appeareth, That the Common Law doth forbid intolerable and excessive oppressing and ransoming of Villains, whereby of rich they become Poor: And yet it may be said, that a man may do with his Villain what he pleaseth, or with his Tenant at will; but the Law limits the same in a reasonable and convenient manner: For it appeareth, that such intolerable oppression of the poor Tenants is to the disinheritson of him in the Reversion. So in the Case at Bar, Although that the Fine is incertain, yet it ought to be reasonable, and so it appeareth by the said Custome which the Defendant hath alledged. And therefore in such Case, the Lord cannot take as much as he pleaseth, but the Fine ought to be reasonable according to the Resolve of the Court in the said Case of Hubbard in the fourth part of my Reports 30. It was resolved, That if the Lord and Tenant cannot agree of the Fine, but the Lord demandeth more than a reasonable Fine, that the same shall be decided and adjudged by the Court, in which any Suit shall be for, or by reason of the denying of the Fine. And the Court shall adjudge what shall be said a reasonable Fine, having regard to the quality and value of the Land, and other necessary circumstances which ought to appear in pleading upon a Demurrer, or found by Verdict: And if the Fine which the Lord or his Steward asseseth be reasonable, Let the Copyholder well advise himself before he deny the payment of it: And alwaies when reasonableness is in question, the same shall be determined by the Court in which the Action dependeth: As reasonable time, 21 H. 6. 30. 22 E. 4. 27. & 50. 29 H. 8. 32. &c. So if the Distresse be reasonable, and the like, &c.

See Glanvil lib. 9. cap. 8. Optime. 5. rationabilibus auxiliis, ita tamen moderat. secund. Quantitatem feodorum suorum & secundum facultates ut nemini gravidæ viderentur. &c. Vide Bracton. 84. b. rationab. relev. 1. quod rationem & mensuram non excedat. and see him there 86. optime, &c.

Vide 14 H. 4. 4. by Hil.

Bracton l. 2. fol. 51. Quam longum debet esse tempus non definitur in jure, sed pendet ex justiciariorum discretione.

It was resolved, That the said Fine in the Case at the Bar was unreasonable, viz. To demand for a Cottage and an acre of Pasture, five pounds, six shillings, eight pence, for the Admittance of a Copyholder in Fee-simple upon a Surrender made; For this is not like to a voluntary Grant, as when the Copyholder hath but an Estate for life, and dieth, Or if he hath an Estate in Fee-simple, and committeth Felony, there Arbitrio Dom. res æstimari debet; but when the Lord is compellable to admit him to whose use the Surrender is, And when Cestui que use is admitted, he shall be in by him who made the Surrender, and the Lord is but an Instrument to present the same: And therefore in such Case, the value of two years for such an Admittance is unreasonable, especially when the value of the Cottage and one acre of Pasture is a rack, at fifty three shillings by the year.

5. It was resolved, That the Surrender is no more than what the Law

Law ſaith, For in this Caſe in the Judgment of the Law, the Fine is unreaſonable; and therefore the ſame is but ex abundanti: and now the Court ought to Judge upon the whole ſpecial matter; And for the Cauſes aforeſaid, Judgment was given for the Plaintiff.

And Coke chief Juſtice ſaid in this Caſe, That where the uſage of the Court of Admiralty is to amerce the Defendant for his default by his diſcretion, as it appeareth in 19 H.6.7. That if the Amerciament be outrageous and exceſſive, the ſame ſhall not bind the party, and if it be exceſſive or not, it ſhall be determined in the Court in which the Action ſhall be brought, for the levying of it: And the Writ of Account is againſt the Bayliff, or Guardian, Quod reddat ei rationabilem Computum de exitibus Manerii. And the Law requireth a thing which is reaſonable, and no exceſs or extremity in any thing.

II. Mich. 6 Jacobi, in the Common Pleas.

Porter and Rocheſters Caſe.

The Statute of 23 H. 8. of citing out of Dioceſes.

THis Term Lewis and Rocheſter who dwelt in Eſſex within the Dioceſe of London, were ſued for ſubſtraction of Tithes growing in B. within the County of Eſſex, by Porter, in the Court of the Arches of the Biſhop of Canterbury in London. And the Caſe was, That the Archbiſhop of Canterbury hath a peculiar Juriſdiction of fourteen Pariſhes, called a Deanry, exempted from the Authority of the Biſhop of London, whereof the Pariſh of S. Mary de Arcubus is the Chief: And the Court is called the Arches, becauſe the Court is holden there; And a great queſtion was moved, if in the ſaid Court of Arches holden in London within his Peculiar, he might cite any dwelling in Eſſex for ſubſtraction of Tithes growing in Eſſex; Or if he be prohibited by the Statute of the twenty third year of King Henry the eighth, cap.9. And after that the matter was well debated as well by Councell at the Bar, as by Dr. Ferrard, Dr. James, and others in open Court, and laſtly, by all the Juſtices of the Common Pleas, a Prohibition was granted to the Court of Arches. And in this Caſe divers Points were reſolved by the Court.

1. That all Acts of Parliament made by the King, Lords, and Commons of Parliament are parcell of the Laws of England, and therefore ſhall be expounded by the Judges of the Laws of England, and not by the Civilians and Commoniſts, although the Acts concern Eccleſiaſticall and Spiritual Juriſdiction; And therefore the Act of 2 H.4.cap.15. by which in effect it is enacted, Quod nullus teneat, doceat, informet, &c. clam, vel publice aliquam nefandam opinionem contrariam fidei Catholicæ ſeu determinationi Eccleſiæ ſacro-ſanctæ, nec de hujuſmodi ſecta, & nefandis Doctrinis Conventiculas faciat: And that in ſuch Caſes, the Dioceſan might arreſt and impriſon ſuch Offender, &c. And in 10 H.7. the Biſhop of London commanded one to be impriſoned, becauſe that the Plaintiff ſaid that he ought not to pay his Tithes to his Curat: and the party ſo impriſoned brought an Action of Falſe Impriſonment againſt thoſe who arreſted him by the commandment of the Biſhop; and there the matter is well argued, What words are within the ſaid Statute, and what without the Statute: So upon the ſame Statute it was reſolved in 5 E. 4. in Keyſars caſe in the Kings

Kings Bench, which you may ſee in my Book of Precedents: And ſo the Statutes of Articuli Cleri, de Prohibitione regia; De Circumſpecte agatis, of 2 E. 6. cap. 13. and all other Acts of Parliament concerning Spiritual Cauſes, have always been expounded by the Judges of the Common Law: as it was adjudged in Wood's Caſe, Paſch. 29 Eliz. in my Notes, fol. 22. So the Statute of 21 H. 8. cap. 13 hath been expounded by the Judges of the Realm concerning Pluralities, and the having of two Benefices: Common Laws and Diſpenſations, ſee 7 Eliz. Dyer 233. The Kings Courts ſhall adjudg of Diſpenſations and Commendams: See alſo 17 Eliz. Dyer 251. 14 Eliz. Dyer 312. 15 Eliz. Dyer 327. 18 Eliz. Dyer 352. and 347. 22 Eliz. Dyer 377. Conſtruction of the Statute cap. 12. Smiths Caſe, concerning Subſcription which is a meer Spiritual thing. Alſo it appeareth by 22 Eliz. Dyer 377. That for want of ſubſcription the Church was always void by the ſaid Act of 23 Eliz. and yet the Civilians ſay, that there ought to be a Sentence Declaratory, although that the Act maketh it void.

2. It was reſolved by Coke chief Juſtice, Warberton, Daniel, and Foſter Juſtices, That the Archbiſhop of Canterbury is reſtrained by the Act of 23 H. 8. cap. 9. to cite any one out of his own Dioceſe, or his Peculiar Jurisdiction, although that he holdeth his Court of Arches, within London. And firſt it was objected,

That the Title of the Act is; An Act that no perſon ſhall be cited out of the Dioceſe where he or ſhe dwelleth, except in certain Caſes: And here the Archbiſhop doth not cite the ſaid Party dwelling in Eſſex, out of the Dioceſe of London, for he holdeth his Court of Arches within London.

2 The Preamble of the Act is, Where a great number of the Kings Subjects dwelling in divers Dioceſes, &c. And here he doth not dwell in divers Dioceſes.

3. Far out of the Dioceſe where ſuch men, &c. dwell, and here he doth not dwell far out, &c.

4. The body of the Act is, No manner of perſon ſhall be cited before any Ordinance, &c. out of the Dioceſe or peculiar Jurisdiction where the perſon ſhall be inhabiting, &c. And here he was not cited out of the Dioceſe of London. To which it was anſwered and reſolved, That the ſame was prohibited by the ſaid Act for divers Cauſes.

1. As to all the ſaid Objections, One anſwer makes an end of them all: For Diœceſis dicitur diſtinctio, vel diviſio, ſive gubernatio, quæ diviſa, & diverſa eſt ab Eccleſia alterius Epiſcopatus, & Commiſſa Gubernatio in unius; and is derived a Di. quod eſt duo, & electio, id eſt, ſeparatio, quia ſeparat duas Juriſdictiones: So Dioceſe ſignifies the Juriſdiction of one Ordinary ſeparated and divided from others; And becauſe the Archbiſhop of Canterbury hath a peculiar Jurisdiction in London, exempt out of the Dioceſe or Jurisdiction of the Ordinary or Biſhop of London: For that cauſe it is fitly ſaid, in the Title, Preamble, and body of the Act, That when the Archbiſhop ſitting in his exempt Peculiar in London, cites one dwelling in Eſſex, he cites him out of the Dioceſe or Jurisdiction of the Biſhop of London, ergo he is cited out of the Dioceſe: And in the clauſe of the penalty of Ten pounds, It is ſaid, out of the Dioceſe, or other Jurisdiction where the party dwelleth, which agreeth with the ſignification of Dioceſe before. And as to the words, Far off, &c. they were put in the Preamble, to ſhew the great miſchief which was before the Act: As the Statute of 32 H. 8. cap. 33. in the Preamble, it is Diſſeiſins with ſtrength; and the body

of the Act saith, such Disseisor, yet the same extendeth to all Disseisors, but Disseisin with force was the greatest mischief, as it is holden in 4, and 5 Eliz. Dyer 219. So the Preamble of the Statute of West. 2. cap. 5. is, Heirs in Ward, and the body of the Act is, Hujusmodi præsentat. as it is adjudged in 44 E. 3. 18. That an Infant who hath an Advowson by descent, and is out of Ward, shall be within the remedy of the said Act, but the Frauds of the Guardians was the greater mischief. So the Preamble of the Act of 21 H. 8. cap. 15. which gives falsifying of Recoveries, recites in the Preamble, That divers Lessees have paid divers great Incomes, &c. Be it enacted, That all such Termors, &c. and yet the same extends to all Termors: and yet all these Cases are stronger than the Case at Bar, for there that word (such) in the body of the Act referreth the same to the Preamble, which is not in our Case.

2. The body of the Act is, No manner of person shall be henceforth cited before any Ordinary, &c. out of the Diocese or peculiar Jurisdiction where the person shall be dwelling: And if he shall not be cited out of the Peculiar before any Ordinary, à Fortiori, the Court of Arches which sits in a Peculiar, shall not cite others out of another Diocese: And these words, Out of the Diocese, are to be meant out of the Diocese or Jurisdiction of the Ordinary, where he dwelleth; but the exempt Peculiar of the Archbishop is out of the Jurisdiction of the Bishop of London, as St. Martins, and other places in London, are not part of London, although they are within the circumference of it.

3. It is to be observed, That the Preamble reciting of the great mischief, recites expressly, That the Subjects were called by compulsary process to appear in the Arches, Audience, and other high Courts of the Archbishoprick of this Realm; So as the intention of the said Act was to reduce the Archbishop to his proper Diocese or peculiar Jurisdiction, unless it were in five Cases.

1. For any Spiritual Offence or cause committed, or omitted contrary to the right and duty by the Bishop, &c. which word (omitted) proves that there ought to be a default in the Ordinary.

2. Except it be in case of Appeal, and other lawful cause wherein the party shall find himself grieved by the Ordinary after the matter or cause there first begun; ergo the same ought to be first begun before the Ordinary.

3. In case that the Bishop of the Diocese, or other immediate Judg or Ordinary dare not, or will not convent the party to be sued before him; where the Ordinary is called the immediate Judg, as in truth he is; and the Archbishop, unless it be in his own Diocese (these special Cases excepted) mediate Judg, scil. by Appeal, &c.

4. Or in case that the Bishop of the Diocese, or the Judg of the place within whose Jurisdiction, or before whom the Suit by this Act should be begun and prosecuted, be party directly or indirectly to the matter or cause of the same suit; Which clause in express words is a full exposition of the body of the Act, scil. That every suit (others than those which are expressed) ought to be begun and prosecuted, before the Bishop of the Diocese, or other Judg of the same place.

5. In case that any Bishop, or any inferiour Judg, having under him Jurisdiction, &c. make request, or instance to the Archbishop, Bishop, or other inferiour Ordinary or Judg, and that to be done in cases only where the Law Civil or Common doth affirm, &c. By which it fully appeareth, That the Act intendeth, That every Ordinary and

Ecclesiastical

Ecclesiastical Judg should have the Conusance of Causes within their Jurisdiction, without any Concurrent Authority or Suit by way of prevention: And by this, the Subject hath great benefit as well by saving of travel and charges to have Justice in his place of habitation, as to be judged where he and the matter is best known; As also that he shall have many Appeals as his Adversary in the highest Court at the first. Also there are two Provisoes which explain it also, scil. That it shall be lawful to every Archbishop to cite any person inhabiting in any Bishops Diocese within his Province, for matter of Heresie, (which were a vain Proviso, if the Act did not extend to the Archbishop: But by that special Proviso for Heresie, it appeareth, that, for all causes not excepted, is prohibited by the Act) Then the words of the Proviso go further, If the Bishop or other Ordinary immediately hereunto consent, or if the same Bishop or other immediate Ordinary or Judg do not his duty in punishment of the same; which words immediately and immediate expound the intent of the makers of the Act.

2. There is a saving for the Archbishop, the calling any person out of the Diocese where he shall be dwelling to the probate of any Testaments; which Proviso should be also in vain, if the Archbishop notwithstanding that Act should have concurrent Authority with every Ordinary through his whole Province: Wherefore it was concluded that the Archbishop out of his Diocese, unless in the Cases excepted, is prohibited by the Act of 23 H. 8. to cite any man out of any other Diocese. And in truth the Act of 23. of Henry the Eighth, is but a Law declaratory of the ancient Canons, and of the true exposition of them: And that appeareth by the Canon, Cap. Romana in sexto de Appellationibus, and Cap. de Competenti in sexto. And the said Act is so expounded by all the Clergy of England, at a Convocation in London, An. 1 Jac. Regis 1603. Canon 94. Where it is decreed, ordained, and declared, That none should be cited to the Arches, or Audience, but the Inhabitants within the Archbishops Diocese, or Peculiar, other than in such particular Cases only as are expressly excepted and reserved in and by a Statute, Anno 23 H. 8. cap. 9. And the King by Letters Patents under the great Seal hath given his Royal Assent to this amongst others from time to time to be observed, fulfilled, and kept, as well by the Archbishop of Canterbury, the Bishops and their Successors, and the rest of the whole Clergy of the Province of Canterbury, in their several Callings, Offices, Functions, Ministeries, Degrees, and Administrations; as also by all and every Dean of the Arches, and other Judg of the said Archbishops Courts, Guardians of Spiritualties, Chancellors, &c. So the same is also expressly confirmed under the great Seal. And although the Archbishoprick of Canterbury was then void, yet the Guardian of the Spiritualties was there, and the Archbishop of Canterbury that now is, and then Bishop of London, was by Letters Patents, President of the said Council in the place of the Archbishop then deceased: And the King gave his Royal Assent to the same, and the said Canon is of as full force as if the said late Archbishop of Canterbury had been then alive. And whereas it is said in the preamble of the Act, In the Arches, Audience, and other high Courts of the Archbishop of this Realm; It is to be known, That the Archbishops of this Realm before that Act had power Legatine from the Pope, by which they pretended to have not only supereminent Authority over all, but concurrent Authority with every Ordinary in his Diocese, not as Archbishop of Canterbury, &c. but by his power and

The Act of 23 H. 8. is a Declaration of the old Canon Law.

Canon 1 Jac. at the Synod at *London*. Vi. *Linwood de excusationibus*, 200. Lit. m. 5. & pag. 2. L. 2.

Archbishops were *Legati nati*, and had Legatine power, which is now abolished, vi. *Linwood*.

authority Legatine: For Sunt tria genera Legatorum. 1. Quidam de latere Dom. Papæ mittuntur, ut Cardinales quos appellant fratres. 2. Alii ſunt Dativi, & non de latere, qui ſimpliciter in Legatione mittantur, &c. 3. Sunt Nati, ſive Nativi, qui ſuarum Eccleſiarum prætextu legatione fingantur, & Tales ſunt quatuor, ſcil. Archiepiſcopus Cant. Eboracenſis, Remanenſis, & Piſanis. So as before that Act, the Archbiſhop of Canterbury, was Legatus Natus, and by force of his authority Legatine uſurped againſt the Canons upon all the Ordinaries in his Precinct, and by colour thereof claimed currant authority with them, which although they held in the Courts of the Archbiſhop, the ſame was remedied by the Act of 23 H. 8. cap. 9. and all that which he uſurped before, was not as he was Archbiſhop, for as to that he was reſtrained by the Canons, but as he was Legatus Natus, which authority is now taken away and aboliſhed utterly.

Vi. lib. Arch. Cant. p. 39. that the Archbiſhop of Cant. hath a Peculiar in many Dioceſes.

Laſtly, If the ſaid Act of 23 H. 8. cap. 9. ſhould not be ſo expounded, Then the Act which is principally made (as it appeareth by the Preamble againſt the Courts of the Archbiſhoprick) ſhould be as to them illuſory; For if the Biſhop of Canterbury, in reſpect of his exempt Peculiar in London, may draw to him all the Dioceſe in London; ſo might he at Newington which is a Peculiar in Wincheſter Dioceſe, draw to him the whole Dioceſe of Wincheſter; and at Totteredge near Bornet, the whole Dioceſe of Lincoln, and ſo of the like.

3. It was reſolved, That when any Judges are prohibited by any Act of Parliament, that if they do proceed againſt the Act, there a Prohibition lieth. As againſt the Steward and Marſhall of the Houſhold. Quod Seneſchallus & Mariſcallus non teneant Placit. de libero tenem. de Debito, de Conventione, &c. So the Statute of Articuli ſuper chartas, cap. 3. Regiſter fol. 185. inter Brevia ſuper ſtatuta. So againſt the Conſtable of the Caſtle of Dover: Quod non tangit Cuſtodiam Caſtri. So to Juſtices of Aſſiſe upon the Statute Quod Inquiſitiones quæ ſunt magnæ exactionis non capiantur in Patria.

Vi. Paſc. 42 Eliz. Rot. 139. *Rudd's* Caſe, a Prohibition for citing out of the Dioceſe.

Also to the Treaſurer and Barons of the Exchequer, upon the ſtatute De Articul. ſuper Cartas, cap. 4. The ſtatute of Rutland, cap. ultimo. Quod communia Placit. non teneantur in Scaccario. All which, and many more, you may ſee in the Regiſter inter Brevia ſuper Statuta. See F. N. B. 45, & 46, &c. 17 H. 6. 54. vi. 13 E 3. to Prohibition: A Prohibition to the Chancellor, and diverſity of Courts in the Title of Chancery. So againſt all Eccleſiaſtical Judges upon the ſtatute of 2 H. 5. cap. 3. If the Judges there will not give or deliver to the party a Copy of the Libel, although that the matter be meer Eccleſiaſtical: and therewith agreeth 4 E. 4. 37. and F. N. B. 43. e. So the Caſe upon the Statute of 2 H 5. cap. 15. If the Eccleſiaſtical Judges in caſe of Hereſie, and other matters of meer Spiritualty do not proceed according to the intention of the ſame Statute; as it appeareth by the Precedent in 5 E. 4. Keyſons Caſe, 10 H. 7. 17. See the opinion of Paſton, 9 H. 6. 3. A man excommunicated by the Biſhop of London, for a Crime done in another Dioceſe, ſhall not be grieved thereby; ſo as the Common Law takes notice of the Canons, in ſuch caſe, as Coram non Judice. And although the Statute of 23 H. 8. inflicts a penalty, yet a Prohibition lyeth, for the inflicting of the penalty doth not take away the Prohibition of the Law: and therefore, Cap. which inflicts puniſhment if the Sheriff doth not put his Name unto the Return; yet the ſame is Error if he doth not put to his Name: See 35 H. 6. 6. when any thing is prohibited by a Statute, if the party be convicted, he ſhall be fined for

Vi. If any one in the Spiritual Court appeals contrary to the Statute of 24 H. 8. cap. 12. although the matter be meer Spiritual, a Prohibition lieth. So upon the Statute of 2 H. 5. cap. 2.

the

the contempt to the Law: and 19 H. 6. 4. agrees in Maintenance: And if every person should be put to his Action upon the Statute, the same should be cause of Suits and vexation, and the shortest and more easy is to have a Prohibition: See the Statute of 21 H. 8. cap. 6. of Mortuaries, by which it is enacted, That no Parson, Vicar, Curat, &c. demand any Mortuary but in such manner as is mentioned in the Act, upon pain of forfeiture of so much in value as they take, more than is limited by the Act, and forty shillings over to the party grieved. Yet it appeareth by Doctor and Student lib. 2. cap. 55. fol. 105. That if the Parson, &c. sueth for Mortuaries otherwise than the Act appointeth, that a Prohibition lyeth; yet there is a Penalty added, which is an authority expresly in the Point: And the Case at Bar is a more strong Case, and that for three reasons.

1. It was made an affirmance of the Canon Law.

2. It was made for the ease of the People and Subjects, and for the maintenance of the Jurisdiction of the Ordinary, so as the Subjects have benefit by the Act; and therefore although that the King may dispence with the penalty, yet the Subject grieved shall have a Prohibition. And the Rule of the Court was, Fiat Prohibitio Curiæ Cantuar. de Arcub. inter partes pradict' per Curiam. And Sherley, and Harris Junior, Serjeants at Law, were of Councell in the Case.

See 2 H. 4 10. by Haukford, and so affirmed by the Court, when one who hath not authority, holdeth plea in spiritual things, whereof the Jurisdiction doth not belong to him, yet no consultation shall be granted, because a consultation shall not be granted to one that hath not power, &c.

III. Mich. 6 Jacobi Regis. Edwards Case.

THe high Commissioners in Causes Ecclesiasticall objected divers Articles in English, against Thomas Edwards dwelling in the City of Exeter. High Commission.

1. That Mr. John Walton hath been many years trained up in Learning in the University of Oxford, and there worthily admitted to severall degrees of Schools, and deservedly took upon him the degree of Doctor of Physick.

2. That he was a Reverend, and well practised man in the Art of Physick.

3. That you the said Thomas Edwards are no Graduate.

4. That you knowing the Premisses, notwithstanding you the said Edwards, &c. of purpose to disgrace the said Dr. Walton, and to blemish his Reputation, Learning and Skill, with infamy and reproach, did against the Rules of charity write and send to the said Mr. Doctor Walton, a lewd and ungodly, and uncharitable Letter, and therein taxed him of want of Civility and Honesty, and want of Skill and Judgment in his Art and Profession, &c. And you so far exceeded in your immoderate and uncivil Letter, that you told him therein in plain termes, He may be crowned for an Asse, as if he had no manner of skill in his Profession, and were altogether unworthily admitted to the said Degrees, and therein you purposely and advisedly taxed the whole University of rashness and indiscretion for admitting him to that Degree without sufficiency and desert.

5. And further to disgrace the said Mr. Doctor Walton, in the said University, did publish a Copy of the said Letter to Sir William Courtney and others, and in your Letter was contained, Sipsilam lichenen mentegram, Take that for your inheritance, and thank God you had a good Father: And did not you thereby covertly

vertly mean, and imply, That the Father of the ſaid Dr. Walton (being late Biſhop of Exeter, and a Reverend Prelate of this Land) was ſubject to the Diſeaſes of the French Pox and Leproſie, to the diſlike of the Dignity and Calling of Biſhops.

6. That in another Letter you ſent to Mr. Dr. Maders Doctor of Phyſick, you named Mr. Doctor Walton, and made a Poem in your Letter: And we require you upon your Oath to ſet down, whether you meant not that they were both Cuckolds, and what other meaning you had.

7. You knowing that Dr. Walton was one of the high Commiſſion in the Dioceſe of Exeter, and having obtained a Sentence againſt him in the Star-Chamber, for contriving and publiſhing of a Libell, did triumphingly ſay, That you had gotten on the hipp a Commiſſioner for Cauſes Eccleſiaſticall in the Dioceſe of Exeter, which you did to diſlike and diſgrace him, and in him the whole Commiſſion Eccleſiaſticall in thoſe parts.

Laſtly, that after the Letter miſſive ſent unto you, you ſaid arrogantly, That you cared not for any thing that this Court can do unto you, nor for their cenſure, for that you can remove this matter at your pleaſure.

And this Term it was moved to have a Prohibition in this Caſe. And the matter was well argued; And at laſt it was reſolved by Coke chief Juſtice, Warberton, Daniel, and Foſter Juſtices, That the firſt ſix Articles were mer Temporall concerning Doctor Walton in his Profeſſion of Phyſick, and ſo touched the Temporall perſon, and a temporall matter, and in truth, it is in the nature of an Action upon the Caſe for Scandall in his Profeſſion of Phyſick: And yet the Commiſſioners themſelves do proceed in the ſame Ex Officio. And it was reſolved, that as for them, a Prohibition doth lye for divers cauſes.

1. Becauſe that the matter and perſons are Temporal.

2. Secondly, Becauſe it is for Defamation, which if any ſuch ſhall be for the ſame, it ought to begin before the Ordinary, becauſe it is not ſuch an Enormous Offence, which is to be determined by the high Commiſſioners: And for the ſame reaſon Suit doth not lye before them, for calling the Doctor Cuckold, as it was objected in the ſeventh Article: And it was ſaid, that the high Commiſſioners ought to incur the danger of Præmunire.

2. It was reſolved, That the Eccleſiaſtical Judge cannot examine any man upon his Oath, upon the intention and thought of his Heart, for Cogitationis pœnam nemo emoret. And in caſes where a man is to be examined upon his Oath, he ought to be examined upon Acts or words, and not of the intention and thought of his heart; and if every man ſhould be examined upon his Oath, what opinion he holdeth concerning any point of Religion, he is not bound to anſwer the ſame, for in time of danger, Quis modo turus erit, if every one ſhould be examined of his thoughts. And ſo long as a man doth not offend neither in act nor in word any Law eſtabliſhed, there is no reaſon that he ſhould be examined upon his thought or Cogitation: For as it hath been ſaid in the Proverb, Thought is free; And therefore for the ſixth and ſeventh Articles, they were reſolved as well for the matter as for the form in offering to examine the Defendant upon his Oath, of his intention and meaning, to be ſuch, to which the Defendant was not to be compelled to anſwer: Ergo, it was reſolved, that as to the Article, he might juſtifie the ſame, becauſe as it appeareth upon his own ſhewing, that the

See Book of Entries 444. & 447. Non eſt Juri conſentaneum quod quis ſuper iis quorum cognitio ad nos pertinet in Curia Chriſtianitatis trahatur in placita. vi. Stat. Circumſpecte agatis, An. 13 E. 1. Epiſcopus teneat placita in Curia Chriſtianitatis de his quæ ſunt mere Spiritualia. Et vi. Lindwood f. 70. Lit. m. dicuntur mere Spiritualia quia non habent mixturam Temporalem. vi. 22 E. 4. l. Conſultat. vi. 22 E. 4. the Abbot of Sions caſe.

the Doctor was ſentenced in the Star-chamber: Alſo the Libell is matter mær Temporall, and if it were mær Spirituall ſuch a Defamation is not examinable before the high Commiſſioners.

As to the laſt Article, It appeareth now by the Judgment of this Court, that he might well Juſtifie the ſaid words: Alſo the high Commiſſioners ſhall not have Conuſance of any Scandall to themſelves for that they are parties; and ſuch Scandall is punishable by the Common Law, as it was reſolved in Hales Caſe, which ſee in the Book of the Lord Dyers Reports, and ſee in my Book of Precedents, the Copy of the Indictment of Hales, for ſcandalling of the Eccleſiaſticall Commiſſioners. Judex non poteſt injuriam ſibi datam punire. Vi. the Stat. of 23 H. 8. c. 9.

Note, the Biſhop of Wincheſter being Viſiter of the School of Wincheſter of the Foundation of Wickham Biſhop of Wincheſter; and the Biſhop of Cant. and other his Colleagues, An. 5 Car. cited the Uſher of the ſaid School, by force of the ſaid Commiſſion to appear before them and proceed there againſt him, for which they incurred the danger of a Premunire. And ſo did the Biſhop of Canterbury and his Colleagues, by force of a high Commiſſion to them directed, cite one Humphrey Frank Maſter of Arts and Schoolmaſter of the School of Sevenock, (of the Foundation of Sir William Sevenock, in the time of King Henry the ſixth) to appear before the high Commiſſioners at Lambeth the ſixth day of December laſt paſt, which citation was ſubſcribed by Sir John Bennet Doctor of Law, Doctor James, and Doctor Hickman, three of the high Commiſſioners: and Sir Chriſtopher Perkins procured the ſaid Citation to be made, and when the ſaid Frank appeared, the Archbiſhop being aſſociated with Sir Chriſtopher Perkins, and Doctor Abbot Dean of Wincheſter, made an Order concerning the ſaid School (ſcil.) That the ſaid Frank ſhall continue in the ſame School untill the Annunciation, and that he ſhould have twenty pounds paid to him by Sir Ralph Boſoile Knight.

IV. Mich. 6 Jacobi Regis.

Taylor and Shoiles Caſe.

TAylor informed upon the Statute 5 Eliz. cap. 4. Tam pro Domino Reg. quam pro ſeipſo in the Exchequer, That the Defendant had exerciſed the Art and Myſtery of a Brewer, &c. and averred that Shoile the Defendant did not uſe or exerciſe the Art or Myſtery of a Brewer, at the time of the making of the Act, nor had been Apprentice by ſeven years at leaſt, according to the ſaid Act, &c. The Defendant did demur in Law upon the Information, and Judgment was given againſt him by the Barons of the Exchequer. And now in this Term upon a Writ of Error, the matter was argued at Serjeants-Inne, before the two chief Juſtices, and two matters were moved; The One, That a Brewer is not within the ſaid Branch of the ſaid Act: For the words are, That it ſhall not be lawfull to any perſon or perſons, other than ſuch as now lawfully uſe or exerciſe any Art, Myſtery, or manuall Occupation, to ſet up, uſe or exerciſe any Art, Myſtery, or manuall Occupation, except he ſhall have been brought up therein ſeven years at the leaſt, as an Apprentice. And it was ſaid, That the Trade of a Brewer is not any Art, Myſtery, or manual Occupation within the ſaid Branch, becauſe the ſame is eaſily and preſently learned, and he needs

neds not to have seven years Apprentiship to be instructed in the same, for every Huswife in the Country can do the same: and the Act of Henry the eighth is, That a Brewer is not a Handycraft Artificer.

2. It was moved, That the said Averment was not sufficient, for the Averment ought to be as generall as the exception in the Statute is (scil.) That the Defendant did not use any Art, Mystery, or Occupation at the time of the making of the same Act, for by this pretence if any Art, &c. then as a Taylor, Carpenter, &c. he may now exercise any other Art whatsoever.

As unto the first, It was resolved, That the Trade of a Brewer (scil.) to hold a Common Brewhouse, to sell Beer or Ale to another, is an Art or Mystery within the said Act; for in the beginning of the Act, It is enacted, That no person shall be retained for lesse time than a whole year in any of the Services, Crafts, Mysteries, or Arts of Cloathing, &c. Bakers, Brewers, &c. Cooks, &c. So as by the judgment of the same Parliament, The Trade of a Brewer is an Art and Mystery; which words are in the said Branch upon which the said Information is grounded. Also because that every Huswife brews for her private use; so also she bakes, and dresseth Meat: And yet none can hold a common Bakehouse, or a Cooks Shop to sell to others, unlesse that he hath been an Apprentice, &c. for they are expressly named also in the Act as Arts and Mysteries: And the Act of 22 H. 8. cap. 13. is explained, That a Brewer, Baker, Surgeon, and Scribener Alien, are not handycrafts mentioned within certain penall Lawes: But the same doth not prove, but that they are Arts or Mysteries, for Art or Mystery is more generall than Handycrafts, for the same is restrained to Manufactures.

As to the second Point, It was resolved, That the intention of the Act was, That none should take upon him any Art, but he who hath skill or knowledge in the same: And therefore the Statute intendeth, That he who useth any Art or Mystery at the time of the Act, might use the same Art or Mystery; for Quod quisque norit in hoc se exerceat: And the words of the Act are, As now do lawfully use, &c. And it was said, That it was very necessary, that Brewers should have knowledge and skill in Brewing good and wholsome Beer and Ale, for that the same doth greatly conduce to mens healths: And so the first Judgment was affirmed.

V. Mich. 6 Jacobi, In the Common Pleas.

The Case of Modus Decimandi.

Tithes.

SHerley Serjeant moved to have a Prohibition, because that a person sued to have Tithes of Silva Cedua under twenty years growth in the Weild of Kent; where, by the Custome of it which is a great part of the County, Tithes of any Wood was never paid. And if such a Custome in non Decimando for all Lay-people within the said Weild, were lawfull or not was the question; and to have a Prohibition it was said, That although one particular man shall not prescribe in non decimando, yet such a generall Custome within a great Country might well be, as in 43 E. 3. 32. and 45 E. 3. Custome 15. It was presented in the Kings Bench, That an Abbot had purchased Tenements after the Statute, &c. And the Abbot came and said, That he was Lord of the Town

Town, &c. And the custom of the Town was, That when the Tenant ceaseth for two years, that the Lord might enter until agreement be made for the Arrerages; And that he who held these Tenements was his Tenant, and ceased for two years, and he entred: and the Rule of the Court is, Because it was an usage only in that Town, and not in the Towns, that is, in the Country adioyning, he was put to answer. So as by the same it appeareth, that a Custom was not good in a particular Town, which perhaps might be good and of force in a Country, &c. See 40 Ass. 21. with 27. 39 E. 3. 2. A Custom within a Town, that an Infant, &c. might alien, is not good; But yet such a Custom within Kent hath oftentimes been adjudged to be good. See 7 H. 6. 26. b. 16 E. 2. Prescription 53. Dyer 363. 22 H. 6. 14. 21 E. 4. 25. and 45 Ass. 8. See Doctor and Student, lib. 2. cap. 55. A particular Country may prescribe to pay no Tithes for Corn, Hay, and other things, but that is with this caution, so as the Minister hath sufficient portion besides to maintain him, to celebrate the Divine Service: And fol. 172. it is holden, That where Tithes have not been paid of Under-woods under twenty years growth, that no Tithes shall be paid for the same, because that they do not renew nor increase from year to year, so as they are not due to the Parson but by Custom. And he saith fol. 174. That such a Custom of a whole Country, that no Tithes of a Lordship shall be paid, is good; and it is to be observed, that in all Libels for Tithes of Woods, they allege a prescription to have Tithes of them: But the Court would advise, whether such a Custom for a Town or a Country should be good; But in ancient times, The Parishioners have given or procured to the Parson a Wood or other Lands, &c. to have and to hold to him and his Successors in satisfaction of all Tithes of Wood in the same Parish; and the Parson is now seised of the same Wood, and that without question is a good discharge of his Tithes; and that in such case, if he sueth for Tithes of Wood a Prohibition lieth: And therefore it hath been said now of late, That such opinions were new and without any antiquity, unto the great prejudice of the Church: I will cite you an ancient Judgment many years past, Mich. 25 H. 3. Wilts. Rot. 5. before the King at Westminster, Samson Foliet brought an Attaint upon a Prohibition, against Thomas Parson of Swynden, because he sued him in the Spiritual Court for a Lay Fee of the said Sampson, in Draycot, contrary to the Kings Prohibition, &c. The Defendant pleaded, Quod coram Judicibus Delegatis petiit de eodem Decimas fœni de quodam prato ipsius Samsonis in Walcot unde est in possessione per sententiam Judicum suorum, & fuit antequam Prohibitio Dom. Regis ad eum pervenerit, & quod Pratum prædict. est in Walcot unde ipse est Persona, & non in Draycot: To which the said Samson replied and said, Quod Antecessores sui antiquitus dederunt Duas acras prati Ecclesiæ de Draycot pro decimis fœni quam prædict. Thomas modo petit in eodem prato, quas quidem duas acras prati eadem Ecclesia adhuc habet, & semper hucusque habuit, unde videtur ei quod illud quod prædict. Thomas ultra petit, est de laico feodo suo, & dicit quod pratum illud in quo idem Thomas petit Decimas est in Draycot sicut Breve dicit, & non in Walcot, & de hoc ponit se super Patriam: And the Jury found, Quod prædict. Thomas Persona de Swyndon secutus fuit placita in Curia Christianitatis de Laico feodo prædict. Samsonis contra Prohibitionem Dom. Regis, petendo ab ipso Decimas fœni de quodam prato ipsius Samsonis in Draycot unde Antecessores sui antiquitus dederunt Ecclesiæ de Draycot duas acras prati pro Decimis

ſceni quam prædict. Thomas modo petit,& quas eadem Eccleſia adhuc habet & ſemper hucuſque habuit,&c. Et quod Pratum prædict. in quo idem Thomas petiit Decimas eſt in Draycot,& non in Walcot,&c. Ideo conſideratum eſt quod prædict. Thomas ſit inde in miſericord. & reddat præd. Samſoni 20. Marcas quas verſus eum pro Damnis, &c. Which ancient Judgment I have recited at large, becauſe that the ſame agrees with the Rule and reaſon of the Law continued until this day: For Judgments or Precedents in the time of Ed. 2. E. 1. H. 3. John R. 1. and more ancient are not Authorities or Precedents to be now followed, unleſs that they concur and agree with the Law, and common experience and practice at this day; for many Acts of Parliaments (and ſome of them not extant) have changed the ancient Laws in divers Caſes: and Deſuetude hath antiquated, and time and Cuſtom hath taken away divers others; ſo as the Rule is good, Quod Judiciis poſterioribus fides eſt adhibenda; Et à communi obſervantia non eſt recedendum. There are two points adjudged by the ſaid Record.

1. That ſatisfaction may be given in diſcharge of payment of Tithes; And if the Succeſſor of the Parſon enjoyeth the thing given in ſatisfaction of the Tithes, and ſueth for Tithes in kind, he ſhall have a Prohibition, becauſe that he chargeth his Lay Fee with Tithes, which is diſcharged of them. By which it appeareth that Tithes cannot be diſcharged, and altogether taken away and extinct: And herewith agreeth the Regiſter which is the moſt ancient Book of the Law, fol. 38. Rex,&c. tali Judici,&c. ſalutem. Monſtravit nobis A. tenens quandam partem Manerii de D. quod licet E. nuper Dominus Manerii prædict. per quoddam ſcriptum Indentat. dediſſet & conceſſiſſet F. nuper Perſonæ Eccleſiæ de D. quatuor acras terræ cum pertin. in eodem Manerio Habend. & tenend. eidem F. & ſucceſſoribus ſuis Perſonæ Eccleſiæ prædict. in perpetuum. Et idem F. per prædictum ſcriptum de aſſenſu & voluntate Epiſcopi Lincoln. Dioceſani loci prædict. & J. tunc Patroni Eccleſiæ prædict. conceſſit pro ſe & ſucceſſoribus ſuis quod idem E. hæredes & aſſignati ſui eſſent quieti de Decimis vitulorum,&c. in Manerio prædict. pro prædict. quatuor acris ſibi datis,&c. Et tamen nunc Perſona Eccleſiæ prædict. tenens prædict. quatuor acras terræ prædict. prædict. A. aſſignat. prædict. E. ſuper decimam hujuſmodi vitulorum,&c. in eodem Manerio, ſibi præſentand. trahit in placitum coram,&c. in Curia Chriſtianitatis,&c. Et quia diſcuſſio hujuſmodi Donationis de laico feodo in regno noſtro in Curia noſtra, & non alibi tractari & fieri debet, vobis prohibemus, Quod placitum aliquod ſuper laicum feodum in Regno noſtro non teneatis in Curia Chriſtianitatis, nec quicquam in hac parte quod in enervationem dicti ſcripti aut Donationis, & conceſſionis prædict. quæ in Curia noſtra & non alibi tractari ſicut prædict. eſt cedere poterit attentetis, ſive attentim faciatis quoviſmodo; By which alſo it appeareth, That Tithes may be diſcharged, and that the matter of diſcharge ought to be determined by the Common Law, and not in the Spiritual Court: And it is to be obſerved, That in the ſaid Judgment, nor in the Regiſter any averment is taken of the value of the thing given in ſatisfaction of the Tithes. Alſo by the Act of Circumſpecte agatis made 13 E. 1. it is ſaid, S. Rector petat verſus parochianos oblationes, & decimas debitas,ſeu conſuetas,&c. which proves that there are Tithes due in kind, and other Tithes due by Cuſtom, as a Modus Decimandi,&c. And yet it is reſolved in 19 E. 3. Juriſdiction 28. That the Ordinance of Circumſpecte agatis is not a Statute; and that the Prelates made the ſame, and yet then, the Prelates acknowledged,

That

That there were Tithes due by Custom, which is a Modus Decimandi. By which it appeareth also, That Tithes by Custom may be altered into another thing: So where a man grants a parcel of his Mannor to a Parson in Fee to be quit of Tithes, and makes an Indenture, and the Parson with the assent of the Ordinary (without the Patron) grants to him that he shall be quit of Tithes of his Mannor for that parcel of Land: Afterwards if he or his Assignee be sued in the Spiritual Court for Tithes of his Mannor, he or his Assignee shall have a Prohibition upon that Deed. And if that Deed was made before time of memory, and he hath so continued to be quit of Tithes, he shall have a Prohibition upon that Deed, if he be sued for the Tithes of that Mannor, or of any parcel of the same upon that matter shewed: See 8 E. 4. 14. F.N.B. 41. g. vi. 3 E. 3. 17. 16 E. 3. t. Annuity 24. 40 E. 3. 3. b. and F.N.B 152. And therefore if the Lord of a Mannor hath always holden his Mannor discharged of Tithes, and the Parson had before time of memory, or in ancient times divers Lands in the same Parish of the Gift of the Lord, of which the Parson is seised at this day in Fee, in respect of which, the Parson nor any of his Predecessors ever had received any Tithes of the said Mannor: If the Parson now sueth for Tithes of the Mannor, the Owner of the Mannor may shew that special matter, and that the Parson and his Successors time out of mind have holden those Lands, &c. of the Gift of one who was Lord of the said Mannor, in full satisfaction of the Tithes of the said Mannor; And the proof, that the Lord of the Mannor gave the Lands, that Tithes should never be paid, at this day is good evidence to prove the surmise of the Prohibition. And so of the like: and 19 E. 3. t. Jurisdiction 28. it is adiudged, That Title of Prescription, shall be determined in the Kings Court: And therefore a Modus Decimandi which accrueth by Custom and Prescription in the Kings Court. And it appeareth by the Statute of 6 H. 4. cap. 6. That the Pope by his Bulls discharged divers from payment of Tithes, against which the Act of Parliament was made; and by the Statute of 31 H. 8. cap. 13. That the Possessions of Religious persons given to the King, were discharged of payment of Tithes in certain Cases: and by the Statute of 32 H. 8. cap. 7. it is provided, That all and singular persons shall divide, set out, yield, and pay all and singular Tithes and Offerings aforesaid, according to the lawful customs and usages of the Parishes and places where such Tithes or Duties shall come, or immediately arise or be due: Provided always, and be it enacted, That no person or persons shall be sued or otherwise compelled to pay any manner of Tithes, for any Mannors, Lands, Tenements, or Hereditaments, which by the Laws or Statutes of this Realm are discharged, or not chargeable with the payment of any such Tithes: And the Statute of 2 E. 6. cap. 13. Enacts, That every of the Kings Subiects shall from henceforth justifie, and truly without fraud or guile, divide, set out, &c. all manner of their predial Tithes in their proper kind as they will rise and happen, in such manner and form as hath been of right yielded and paid, within forty years next before the making of this Act, or of Right or Custom ought to be paid. So as it appeareth by this, that Tithe is due of Right, and by Custom: And also in the same Act there is a Proviso in these words; Provided always and be it enacted, That no person shall be sued, or otherwise compelled to yield, give, or pay any manner of Tithes for any Mannors, Lands, Tenements, or Hereditaments, which by the Laws and Statutes of this Realm, or by any Priviledge or Prescription, are not

chargeable

chargeable with the payment of any ſuch Tithes, or that he be diſcharged by any compoſition real: ſo as it appeareth by that Act, that one may be diſcharged from the payment of Tithes five manner of ways.

1. By the Law of the Realm, that is, the Common Law; As Tithes ſhall not be paid of Coals, Quarries, Brick, Tiles, &c. F. N. B. 53. and Regiſter 54. For of the after paſture of a Meadow, &c. nor of Rakings, nor of Wood to make Pales, or Mounds, or Hedges, &c.

2. By the Statutes of the Realm: As by the Statute of 31 H. 8. cap. 13. the Statute of 45 E. 3. &c.

3. By Priviledge, as thoſe of S. John's of Jeruſalem in England; The Ciſtertians, Templars, &c. as it appeareth by 10 H. 7. 277. Dyer.

4. By Preſcription, As by Modus Decimandi, or an annual Recompence in ſatisfaction of them, as appeareth before by the Authorities aforeſaid.

5. By real Compoſition, as appeareth by the ſaid Writ cited out of the Regiſter: And ſo you have one or two examples (for many others which may be added) of theſe five manners of diſcharges of Tithes. And by them all it appeareth, That a man may be diſcharged of the payment of Tithes, as before is ſaid: So as now it apparently appeareth by the Laws of England, both Ancient and Modern, That a Lay-man ought to preſcribe in modo Decimandi, but not in non Decimando: and that in effect agrees with the Opinion of Thomas Aquinas in his Secunda ſecundæ, Quæſt. 86. art. ultimo. For there he ſaith, Quod in veteri lege præceptum de ſolutione Decimarum, partim erat morali inditum ratione naturali quæ dictat Quod iis qui Divino Cultui miniſtrant ad ſalutem totius populi neceſſaria victui debent miniſtr. juxta illud, 1 Cor. 9. Quis militat, &c. Who goeth to War at his own charges, &c. Partim autem erat judiciale ex Divina inſtitutione robur habens, (ſcil.) Quantum ad determinationem certæ partis. And all that agrees with our Law; And he goeth further, In tempore vero Novæ Legis etiam eſt determinatio partis ſolvendæ authoritate Eccleſiæ (That is by their Canons) Inſtituta ſecundum quandam humanitatem, ut ſcilicet non minus populus Novæ Legis Miniſtris novi Teſtamenti exhibeat, quam populus veteris Legis miniſtris veteris Teſtamenti exhibebat, præſertim cum Miniſtri Novæ Legis ſunt majores Dignitate, ut probat Apoſtolus, 2 Cor. 3. Sic ergo patet Quod ad ſolutionem Decimarum tenentur homines partim quidem ex jure naturali, quantum ad hoc quod aliqua portio data eſt miniſtris Eccleſiæ, partim vero ex inſtitutione Eccleſiæ quantum ad determinationem decimæ Partis. See Doctor and Student, Lib. 2. cap. 55. fol. 164. That the tenth part is not due by the Law of God, nor by the Law of Nature, which he calleth the Law of Reaſon: And he citeth John Gerſon, who was a Doctor of Divinity, in a Treatiſe which he calleth Regulæ morales (ſcil.) Solutio Decimarum ſacerdotibus eſt de jure Divino, quatenus inde ſuſtententur, ſed quoad tam hanc vel illam aſſignare aut in alios redditus commutare, poſitivi juris eſt. And afterwards, Non vocatur Portio Curatis debita propterea Decimæ, eo quod eſt Decima pars, imo eſt interdum viceſima, aut triceſima. And he holdeth, That a Portion is due by the Law of Nature, which is the Law of God, but it appertaineth to the Law of Man to aſſign, Hanc vel illam portionem, as neceſſity requireth for their Suſtenance. And further he ſaith, That Tithes may be exchanged into Lands, Annuity, or Rent, which ſhall be ſufficient for the Miniſter, &c. And there he ſaith, That in Italy, and in other the Eaſt Countries, they pay no Tithes, but a certain Portion according to the Cuſtom, &c. And all this is true, if

nor,

not, that Tithes be discharged or changed by one of the said five waies: And forasmuch as it appeareth by themselves, that the part or value was part of the Judiciall Law, certainly the same doth not bind any Christian Common-wealth, but that the same may be altered by reason of time, place, or other consideration, as it appeareth in all punishments inflicted by the Judiciall Law, they do not bind any, for Felony is now punished by death, &c. which was not so by the Judiciall Law, &c. Also forasmuch as now it is confessed, that the tenth part is now due, Ex institutione Ecclesiæ, that is to say, By their Canons, and it appeareth by the Statute of 25 H. 8. cap. 19. That all Canons, &c. made against the Prerogative of the King in his Laws, Statutes, or Customes of the Realm are void, and that was but a Declaratory Law; For no Statute or Custome of the Realm can be taken away or abrogated by any Canon, &c. made out or within the Realm, but only by Act of Parliament: and that well appeareth by 10 H. 7. f. 17. c. 18. That there is a Canon or Constitution, That no Priest ought to be impleaded at the Common Law. And there Brian saith, That a grave Doctor of the Law once said unto him, That Priests and Clarks might be sued at the Common Law well enough; For he said, that Rex est persona mixta, and is Persona unita cum Sacerdotibus Statutis Ecclesiæ. In which case the King might maintain his Jurisdiction by prescription; By which it appeareth that prescription doth prevail against expresse Canons or Constitutions, and is not taken away by them, which prov. s that the Statute of 25 H. 8. was but a Declaration of the ancient Law before: And there is an expresse Prohibition in *Numb.* 18. Nihil aliud possidebunt, Decimarum oblatione contenti quas in usus eorum & necessaria separavi: Which was not part of the Morall Law, or Law of Nature, but part of the Judiciall: And therefore men of the holy Church at this day do possesse Houses, Lands, and Tenements, and not Tithes only. The second point which agrees with the Law at this day, which was adiudged in the said Record of 25 H. 3. is, That the limits and bounds of Towns and Parishes shall be tried by the Common Law, and not in the Spirituall Court: and in this the Law hath great reason, for thereupon depends the Title of Inheritance of the Lay Fee, whereof the Tithes were demanded for Fines, and Recoveries are the common assurances of Lay Inheritances: and if the Spirituall Court should try the bounds of Towns, if they determine that my Land lyeth in another Town than is contained in my Fine, Recovery, or other assurance, I shall be in danger to lose my Inheritance, and therewith agreeth 39 E. 3. 29. 5 H. 5. 10. 32 E. 4. t. Consultation, 3 E. 4. 12. 19 H. 6. 20. 50 E. 3. 20. & many other Precedents untill this day. And note, there is a Rule in Law, that when the Right of tithes shall be tried in the Spiritual Court, & the Spirit. Court hath jurisdiction thereof, that our Courts shall be ousted of the Jurisdiction. 35 H. 6. 47. 38 H 6. 21. 2 E. 4. 15. 22 E. 4. 23. 38 E. 3. 36. 14 H. 7. 17. 13 H. 2. Jurisd. 19. but that is when debate is between Parson and Vicar, or when all is in one Parish, but when they are in severall Parishes, then this Court shall not be ousted of the Jurisdiction. See 12 H. 2. t. Jurisdiction 17. 13 R. 2. ibid. 19. 7 H. 4. 34. 14 H. 4 17. 38 E. 3 56 42 E. 3. 12. And yet there is a Canon expresly against this, which see in Linwood titulo de pœnis 55. And so fol. 227, 228. amongst the Canons or Constitutions of Boniface, An. Dom. 1277. And the causes wherefore the Judges of the Common Law would not permit the Ecclesiastical Judges to try Modum Decimandi, being pleaded in their Court is, because that if the Recom-

Note this difference; Although that the parties do admit the Juriſdiction of the Court, yet upon the pleading, if the right of the Tythes ſhall come in debate, there this Court ſhall be ouſted of the Juriſdiction, and the Spiritual Court ſhall have Juriſdiction: But when the right of tythes cometh in debate, and the Spiritual Court cannot have Juriſdiction or Conuſance of it, as where a Lay-man is Plaintiff as Farmor, or Defendant as ſervant of the Parſon, as a Lay-man Farmor cannot ſue there, nor he who juſtifies a Servant cannot be ſued in Treſpaſs: But if the Suit be between Parſon and Vicar, or Parſon and Parſon, and other Spiritual perſons, if the Kings Court be ouſted of the Juriſdiction after ſeverance of the ninth part; yet the Libel ought to be for ſubſtraction of Tythes, for of that they have Juriſdiction, and not of Tythes ſevered from the nine parts; for that ſhall be in caſe of a *Præmnire*, and it appeareth to the Common Law: See 16 H. 2. in the Caſe of Mortuary. Vide Decretalis Sexti, Lib. 3. tit. de Decimis, cap. 1. fo. 130. Col. 4. Et ſumma Angelica, fo. 72.

pence which is to be given to the Parſon in ſatisfaction of his tythes doth not amount to the value of the Tythes in kinde, they would overthrow the ſame: And that alſo appeareth by Linwood amongſt the Conſtitutions Simonis Mephum, tit. de Decimis cap. Quoniam propter, fo. 139. 6. verbo Conſuetudines, Conſuetudo ut non ſolvantur, aut minus plene ſolvantur Decimæ, non valet: **and** ibidem ſecundum alios, Quod in Decimis realibus, non valet Conſuetudo ut ſolvatur minus decima parte, ſed in perſonalibus, &c. **And** ibidem Lit. M. verbo, Integre, faciunt expreſſe contra opinionem quorundam Theologorum, qui dicunt ſufficere aliquid dari pro Decima. **And that is the true reaſon in both the ſaid Caſes,** ſcil. de modo Decimandi, & de Limitibus Parochiarum, &c. **that they would not adjudg according to their Canons; and therefore a Prohibition lieth: and therewith agreeth 8 E. 4. 14. and the other Books abovesaid, and infinite precedents; and the rather after the Statute of 2 E. 6. cap. 13. And alſo the Cuſtoms of the Realm are part of the Laws of the Realm; and therefore they ſhall be tryed by the Common Law, as is aforeſaid: See 7 E. 6. Dyer 79. and 18 Eliz. Dyer 349. the Opinion of all the Juſtices.**

VI. Mich. 6 Jacob. in the Exchequer.

Baron and Boys Caſe.

Sur Stat. 2 E. 6. cap. 14. of *Ingroſſers.*

IN the Caſe between Baron and Boys, in an Information upon the Statute of 5 E. 6. cap. 14. of Ingroſſers, after Verdict it was found for the Informer, That the defendant had ingroſſed Apples againſt the ſaid Act: The Barons of the Exchequer held clearly, That Apples were not within the ſaid Act, and gave Judgment againſt the Informer upon the matter apparant to them, and cauſed the ſame to be entered in the Margent of the Record where the Judgment was given: and the Informer brought a Writ of Error in the Exchequer chamber, and the only Queſtion was, Whether Apples were within the ſaid Act? the letter of which is, That whatſoever perſon or perſons, &c. ſhall ingroſs or get into his or their hands, by buying, contracting, or promiſe, taking (other than by Demiſe, Grant or Leaſe of Land, or Tythe) any Corn growing in the Fields, or any other Corn or grain, Butter, Cheeſe, Fiſh, or other dead Victual within the Realm of **England,** to the intent to ſell the ſame again, ſhall be accepted, &c. an unlawfull Ingroſſer. **And although that the Statute of 2 E. 6. cap. 15. made againſt Sellers of Victual, which for their great gain conſpire, &c. numbereth Butchers, Brewers, Bakers, Cooks, Coſtermongers and Fruiterers, as Victuallers: yet Apples are not dead Victuals within the Statute of 5 E. 6. For the Buyers and Sellers of Corn and other Victuals have divers Proviſoes and Qualifications for them, as it appeareth by the ſaid Act, but**

Coſter-

Coſtermongers and Fruiterers have not any Proviſo for them: alſo, always after the ſaid Act they have bought Apples and other Fruits by Ingroſs, and ſold them again, and before this time no Information was exhibited for them, no more than for Plums or other fruit, which ſerveth more for delicacy than for neceſſary Food. But the Statute of 5 E. 6. is to be intended of things neceſſary and of common uſe for the ſuſtenance of man: and therefore the words are, Corn, Grain, Butter, Cheeſe, or other dead Victual: which is as much to ſay, as Victual of like quality, that is, of like neceſſary and common uſe: But the Statute of 2 E. 6. cap. 15. made againſt Conſpiracies to enhaunce the prices, was done and made by expreſs words, to extend it to things which are more of pleaſure than of profit: So it was ſaid, That of thoſe Fruits a man cannot be a Foreſtaller within this Act of 5 E. 6. for in the ſame Branch the words are, any Merchandize, Victual, or any other thing. But this was not reſolved by the Juſtices, becauſe that the Information was conceived upon that branch of the Statute concerning Ingroſſers.

VII. Hil. 27 Eliz. in the Chancery.

HIlary Term, the 27 of Eliz. in the Chancery the Caſe was thus: Dns Ninian Menvil ſeiſed of certain Lands in Fæ, took a wife, and levyed a Fine of the ſaid Lands with proclamations, and afterwards was indicted and out-lawed of High Treaſon, and dyed: The Counſes convey the Lands to the Queen, who is now ſeiſed, the five years paſs after the death of the Husband: The Daughters and Heirs of the ſaid Ninian, in a Writ of Error in the Kings Bench, reverſe the ſaid Attainder, M. 26 and 27 Eliz. laſt paſt: and thereupon the Wife ſueth to the Queen (who was ſeiſed of the ſaid Land as aforeſaid) by Petition containing all the ſpecial matter, ſcil. the Fine with proclamations, and the five years paſſed, after the death of her Husband, the Attainder and the reverſal of it: and her own title, ſcil. her marriage, and the ſeiſin of her Husband before the Fine: And the Petition being endorſed by the Queen, Fiat droit aux parties, &c. the ſame was ſent into the Chancery, as the manner is. Fine. Dower. Relation.

And in this caſe divers Objections were made againſt the Demandant.

1. That the ſaid Fine with proclamations ſhould bar the Wife of her Dower, and the Attainder of her Husband ſhould not help her; for as long as the Attainder doth remain in force, the ſame was a bar alſo of her Dower, ſo as there was a double bar to the Wife, viz. the Fine levyed with proclamations, and the five years paſt after the death of her Husband, and the Attainder of her Husband of his Treaſon. But admit that the Attainder of the Husband ſhall avail the Wife in ſome manner, when the ſame is now reverſed in a Writ of Error, and now upon the matter is in Judgment of Law, as if no Attainder had been: and againſt that a man might plead, That there is no ſuch Record, becauſe that the firſt Record is reverſed, and utterly diſaffirmed and annihilated, and now by Relation made no Record ab initio: and therewith agreeth the Book of 4 H. 7. 11. for the words of the Judgment in a Writ of Error are, Quod Judicium prædict. & Errores prædict. & alios in Recordo, &c. revocetur & admittetur, &c. & quod ipſa ad poſſeſſionem ſuam ſive ſeiſinam ſuam (as the caſe requireth) tenementorum

mentorum ſuorum prædictorum, una cum exitibus & proficuis inde à tempore judicii prædict. reddit. percept. & ad omnia quæ occaſione Judicii illius amiſit reſtituatur. By which it appeareth, that the firſt Judgment, which was originally imperfect and erroneous, is for the ſame Errors now annulled and revoked ab initio, and the party againſt whom the Judgment was given reſtored to his poſſeſſion, and to all the mean profits, from the time of the erroneous Judgment given, until the Judgment in the Writ of Error, ſo as the Reverſal hath a Retroſpect to the firſt Judgment, as if no Judgment had been given: And therefore the Caſe in 4 H. 7. 10. b. the caſe is, A. ſeiſed of Land in Fee, was attainted of High Treaſon, and the King granted the Land to B. and afterwards A. committed Treſpaſs upon the Land, and afterwards by Parliament A. was reſtored, and the Attainder made void, as if no Act had been; and ſhall be as available and ample to A. as if no Attainder had been: and afterwards B. bringeth Treſpaſs for the Treſpaſs Meſne; and it was adjudged in 10 H. 7. fol. 22. b. That the Action of Treſpaſs was not maintainable, becauſe that the Attainder was diſaffirmed and annulled ab initio. And in 4 H. 7. 10. it is holden, That after a Judgment reverſed in a Writ of Error, he who recovered the Land by Erroneous Judgment ſhall not have an Action of Treſpaſs for a Treſpaſs Mean, which was ſaid, was all one with the principal caſe in 4 H. 7. 10. and divers other Caſes were put upon the ſame ground.

It was ſecondly objected, That the Wife could not have a Petition, becauſe there was not any Office by which her title of Dower was found, ſcil. her marriage, the ſeiſin of her Husband, and death: for it was ſaid, that although ſhe was married, yet if her Husband was not ſeiſed after the age that ſhe is Dowable, ſhe ſhall not have Dower: as if a man ſeiſed of Land in Fee, taketh to Wife a woman of eight years, and afterwards before her age of nine years, the Husband alieneth the Lands in Fee, and afterwards the woman attaineth to the age of nine years, and the Husband dieth; it was ſaid, that the woman ſhall not be endowed. And that the title of him who ſueth by Petition ought to be found by Office, appeareth by the Books in 11 H. 4. 52. 29 Aſſ. 31. 30 Aſſ. 28. 46 E. 3. bre. 618. 9 H. 7. 24. &c.

As to the firſt Objection, it was reſolved, That the Wife ſhould be endowed, and that the Fine with proclamations was not a bar unto her, and yet it was reſolved that the Act of 4 H. 7. cap. 24. ſhall bar a woman of her Dower by a Fine levied by her Husband with proclamations, if the woman doth not bring her Writ of Dower within five years after the death of her Husband, as it was adjudged Hill. 4 H. 8. Rot. 344. in the Common Pleas, and 5 Eliz. Dyer 224. For by the Act, the right and title of a Feme Covert is ſaved, ſo that ſhe take her action within 5. years after ſhe become uncovert, &c. but it was reſolved, That the wife was not to be aided by that ſaving: for in reſpect of the ſaid Attainder of her Husband of Treaſon, ſhe had not any right of Dower at the time of the death of her Husband, nor can ſhe after the death of her Husband bring an Action, or proſecute an Action to recover her Dower, according to the direction and ſaving of the ſaid Act: But it was reſolved, That the Wife was to be aided by another former Saving in the ſame Act, viz. And ſaving to all other perſons (ſcil. who were not parties to the Fine) ſuch action, right, title, claim, and intereſt in or to the ſaid Lands, &c. as ſhall firſt grow, remain, deſcend, or come to them after the ſaid Fine ingroſſed and proclamations made,

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by force of any Gift in Tail, or by any other cause or matter had and made before the said Fine levied, so that they take their Actions and pursue their right and Title according to the Law, within five years next after such Action, Right, Claim, Title, or Interest to them accrued, descended, fallen, or come, &c. And in this case the Action and right of Dower accrued to the wife after the reversal of the Attainder, by reason of a Title of Record before the Fine by reason of the seisin in Fæ (had) and the Marriage (made) before the Fine levied, according to the intention and meaning of the said Act.

And as to the said point of Relation, It was resolved, That sometimes by construction of Law a thing shall relate ab initio to some intent, and to some intent not; For Relatio est fictio Juris, to do a thing which was and had essence, to be annulled ab initio, betwixt the same parties to advance a Right, or Ut res magis valeat quam pereat: But the Law will never make such a construction to advance a wrong, which the Law abhorreth, or to defeat Collaterall Acts which are lawfull, and principally if they do concern Strangers: And this appeareth in this Case (scil.) when an erroneous Judgment is reversed by a Writ of Error: For true it is as it hath been said, That as unto the mean Profits, the same shall have relation by construction of Law, untill the time of the first Judgment given, and that is to favour justice and to advance the right of him who hath wrong by the erroneous Judgment. But if any stranger hath done a Trespass upon the Land in the mean time, he who recovereth after the Reversall shall have an action of Trespass against the Trespassors, and if the Defendant pleadeth that there is no such Record, the Plaintiff shall shew the speciall matter, and shall maintain his Action, so as unto the Trespassors who are wrong Doers, the Law shall not make any construction by way of relation ab initio to excuse them, for then the Law by a fiction and construction should do wrong to him who recovereth by the first Judgment: And for the better apprehending of the Law on this point, it is to know, That when any man recovers any possession or seisin of Land, in any Action by erroneous Judgment, and afterwards the Judgment is reversed as is said before, and upon that the Plaintiff in the Writ of Error shall have a Writ of Restitution, and that Writ recites the first recovery, and the reversall of it in the Writ of Error, is, that the Plaintiff in the Writ of Error shall be restored to his possession and seisin, Una cum exitibus thereof from the time of the Judgment, &c. Tibi præcipimus quod eundem A. ad plenariam seisinam tenementorum prædict. cum pertinentiis sine dilatione restitui facias, & per sacramentum proborum & legalium hominum de Com. suo diligenter inquiras ad quantum exitus & proficua tenementorum illorum cum pertinentiis à tempore falsi Judicii prædict. reddit. usque ad Oct. Sanct. Mich. anno, &c. quo die judicium illud per præfat. Justiciar. nostros revocat. fuit, se attingunt, juxta verum valorem eorundem, eadem exitus & proficua de terris & catallis prædict. B. in baliva tua fieri facias, & denarios inde præfato A. pro exitibus & proficuis tenementorum per eundem B. dicto medio tempore percept. sine dilatione haberi facias: Et qualiter hoc præceptum nostrum fuerit execut. constare facias, &c. in Octab. &c. By which it appeareth, That the Plaintiff in the Writ of Error shall have restitution against him who recovereth of all the mean Profits, without any regard by them taken; for the Plaintiff in the Writ of Error cannot have any remedy against any stranger, but onely against him who is party to the Writ of Error, and therefore the words of the said Writ command

command the Sheriff to enquire of the Iſſues and Profits generally, between the Reverſal and the Judgment, with all which he who recovers ſhall be charged, and as the Law chargeth him with all the mean profits, ſo the Law gives to him remedy notwithſtanding the Reverſal againſt all Treſpaſſors in the interim, for otherwiſe the Law ſhould make a conſtruction by relation to diſcharge them who are wrong doers, and to charge him who recovers with the whole, who peradventure hath good right, and who entereth by the Judgment of the Law, which peradventure is reverſed for want of form, or negligence or ignorance of a Clark. And therefore as to that purpoſe the Judgment ſhall not be reverſed, ab initio, by a Fiction of Law, but as the truth was, the ſame ſtands in force until it was reverſed: and therefore the Plaintiff in the Writ of Error after the Reverſal ſhall have an Action of Treſpaſs for a Treſpaſs mean, becauſe he ſhall recover all the mean profits againſt him who recovered, nor he that recovereth after ſhall be barred of his Action of Treſpaſs for a Treſpaſs mean, by reaſon that his recovery is reverſed, becauſe he ſhall anſwer for all the mean profits to the Plaintiff in the Writ of Error: and therewith agreeth Brian Chief Juſtice, 4 H. 7. 12. a.

Note Reader, If you would underſtand the true ſence and Judgment of the Law, it is needful for you to know the true Entries of Judgments, and the Entries of all proceedings in Law, and the manner and the matter of Writs of Execution of ſuch Judgments. See Butler and Bakers Caſe, in the third part of my Reports, good matter concerning Relations. So as it was reſolved in the Caſe at Bar, Although that to ſome intent the Reverſal hath relation, yet to bar the Wife of her Dower by Fiction of Law, by the Fine with proclamations, and five years paſt after the death of her Husband, when in truth ſhe had not cauſe of Action, nor any right or title ſo long as the Attainder ſtood in force, ſhould be to do wrong by a Fiction of Law, and to bar the Wife, who was a meer ſtranger, and who had not any means, to have any Relief until the Attainder was reverſed.

And as unto the other point or Objection, that the Demandant on the Petition ought to have an Office found for her, it was reſolved, that it needed not in this caſe, becauſe that the title of Dower ſtood with the Queens title, and affirmed it; otherwiſe if the title of the Demandant in the Petition had diſaffirmed the Queens title: alſo in this Caſe, the Queen was not entituled by any Office that the Wife ſhould be driven to traverſe it, &c. for then ſhe ought to have had an Office to find her title: But in Caſe of Dower, although that Office had been found for the Queen which doth not diſaffirm the title in Dower, in ſuch caſe the Wife ſhall have her Petition without Office, becauſe that Dower is favoured in Law, ſhe claiming but onely for term of life, and affirming the title of the Queen. See the Sadlers Caſe in the fourth part of my Reports.

And the caſe which was put on the other ſide was utterly denyed by the Court, for it was reſolved, That if a man ſeiſed of Lands in Fee, taketh a Wife of eight years of age, and alieneth his Lands, and afterwards the Wife attaineth to the age of nine years, and afterwards the Husband dyeth, that the Wife ſhall be endowed: For although at the time of the alienation the Wife was not dowable, yet for as much as the Marriage, and ſeiſin in Fee, was before the alienation, and the title of Dower is not conſummate until the death of her Husband, ſo as now there was marriage, ſeiſin of Fee, age of nine years during the

the Coverture, and the death of the Husband, for that cause she shall be endowed: For it is not requisite that the marriage, seisin and age concur together all at one time, but it is sufficient if they happen during the Coverture: So if a man seised of Lands in Fee take a Wife, and afterwards she elopes from her Husband, now she is barrable of her Dower, if during the Elopement the Husband alieneth, and after the Wife is reconciled, the Wife shall be endowed: So if a man hath issue by his Wife, and the issue dyeth, and afterwards Land descendeth to the Wife, or the Wife purchaseth Lands in Fee, and dyeth without any other issue, the Husband (for the issue which he had before the Descent or purchase) shall be Tenant by the curtesie, for it is sufficient if he have issue, and that the wife be seised during the Coverture; although that it be at several times. But if a man taketh an Alien to Wife, and afterwards he alieneth his Lands, and afterwards she is made a Denizen, she shall not be endowed, for she was absolutely disabled by the Law, and by her birth not capable of Dower, but her capacity and ability began onely by her Denization; but in the other case there was not any incapacity or disability in the person, but onely a tempozary Bar, until such age or reconcilement, which being accomplished the tempozary Bar ceaseth: As if a man seised of Lands in Fee, taketh a Wife, and afterwards the Wife is attainted of Felony, and afterwards the Husband alieneth, and afterwards the Wife is pardoned, and afterwards the Husband dieth, the Wife shall be endowed, for by her birth she was not uncapable, but was lawfully by her marriage and seisin in Fee entituled to have Dower; and therefore when the impediment is removed, she shall be endowed.

VIII. Trinit. 44 Eliz. In the Kings Bench.

Sprat and Heals Case.

Tythes. Covin.

JOhn Sprat Libelled in the Spiritual Court against Walter Heal for subtraction of Tythes, the Defendant in the Spiritual Court pleaded, that he had divided the Tythes from the nine parts: and then the Plaintiff made addition to the Libel (in the nature of a Replication) scil. That the Defendant divided the Tythes from the nine parts, quod prædict. the Plaintiff non fatetur, sed prorsus diffitetur; yet presently after this pretended division in fraudem legis, he took and carried away the same Tythes, and converted them to his own use; and the Plaintiff thereupon obtained sentence in the Spiritual Court, and to recover the treble value according to the Statute of 2 E. 6. cap. 13. And thereupon Heal made a surmise, that he had divided his Tithes, and that the Plaintiff ought to sue in the Spiritual Court for the double value, and at the Common Law for the treble value: And it was objected, That when the Owner of the Corn divides them, then they are become Lay-Chattels, for the taking of which an action lyeth at the Common Law: and therefore after severance from the nine parts, the Parson shall not sue for them in the Spiritual Court: But it was resolved by the whole Court, That the said division or severance mentioned in the Libel, was not any division or severance within the Statute of 2 E. 6. cap. 13. For the same Act provides, That every of the Kings Subjects shall from henceforth truly and justly without fraud

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or guile, divide, ſet out, yield, and pay all manner of other prædiall Tithes in their proper Land, ſo as when he divides them to the purpoſe to carry them away, he doth not divide them juſtly and truly without fraud or guile, but here is fraud and guile, and no way a juſt diviſion, and therefore the ſame is out of the Statute, for the makers of the Statute reſpect quo animo he divides them (ſcil.) with a mind and intention that the Parſon carry them away, as in right he ought, or with a mind and intention that he himſelf carry them away which he ought not, Quia fraus & dolus alicui prodeſſe, aut ſimplicitas alicui obeſſe non debet: And the ſame is Crimen Stellionatum, which we call fraudem rem & impoſteram: And where the words of the Statute are divided, ſet out, &c. their prædiall Tithes, &c. And if any perſon carrieth away his Corn and Hay, and his and their prædiall Tithes, &c. And to make an evaſion out of theſe words, this Invention was deviſed, the Owner of the Corn by Covin ſold his Corn before ſeverance to another, who as Servant to the Vendee reaped the Corn, and carried away the Corn, without any ſeverance, pretending that neither the Vendee, becauſe he did not carry them away, nor the Vendor becauſe he had no property in them, for he did not carry away his Corn, or his prædiall Tithes, ſhould be within that Statute: But it was reſolved, that the Vendor ſhould be charged in that caſe with the penalty of the Statute, for he carrieth them away, and his fraud and covin ſhould not help him or avail him. See 8 E. 3. 290. A reall Action brought by a man of Religion by Colluſion, although that he hath right, yet he ſhall not have execution, 9 H. 6. 41. A recovery upon a good Title by Colluſion, ſhall not abate the Writ, 33 H. 6. 5. A ſale in open Market by Covin ſhall not bind the property of a ſtranger: But it was reſolved, That the Plaintiff could not ſue in the Spirituall Court for the treble value, but for the double value that he might.

IX. Hill. 6 Jacobi, In the Common Pleas.

Neale and Rowſes Caſe.

Extortion. Stat. 21 H. 8. cap. 5.

AT a Niſi prius in London, before my ſelf this Term, the Caſe was this: Edward Neale informed upon the Statute of 21 H. 8. cap. 5. which Plea begun Mich. 6 Jac. Rot. 1031. againſt James Rowſe Commiſſary and Officiall within the Archdeaconry of Huntington, within the Dioceſe of Lincoln, and having probat of Wills and Teſtaments, &c. within the ſame Archdeaconry; And that Nicholas Neale, the third year of the Raign of the King that now is, made his Teſtament and laſt Will in writing, and made the Plaintiff his Executor, and died poſſeſſed of Goods and Chattels to the value of a hundred and fifty pounds: The Defendant then Commiſſary and Officiall, &c. the twenty third of Febr. 1605. at the Parish of S. Mary Bow, Teſtament. prædict. probavit, inſinuavit, regiſtravit & ſigillavit; ac per manus cujuſdam Thomæ Nicke tunc miniſtri ipſius Jacobi Rowſe in ea parte deputat. & authorizat. 14. s. 10 d. pro probatione, inſinuatione & regiſtratione Teſtamenti prædict. de eodem Edwardo, &c. qui tam, &c. colore Officii ſui prædict. adtunc & ibidem extortive recepit, & habuit contra formam ſtatuti prædict. with this that the ſaid Edward, qui tam, &c. will add, That the writing of the ſaid Teſtament according to the rate of a peny for every ten Lines of the ſaid Teſtament, every line thereof containing

ing in length ten Inches, non attingebat, to the ſumme of twelve ſhillings four pence, according to the form of the Statute aforeſaid, &c. The Defendant pleaded Nihil debet, And at the Niſi prius, the Evidence of two Witneſſes was, That the Plaintiff cauſed the ſaid Teſtament which was in Paper, to be ingroſſed in Parchment; And the Plaintiff offered both to the ſaid Rowſe, the Official, to be proved, and be anſwered, That he would prove it, if his Fees ſhall be paid to him, And the Plaintiff asked him what were his Fees, and he wrote them in a paper, which amounted to fourteen ſhillings ten pence for the Probat, Inſinuation, Regiſtring, and Sealing: And thereupon the Plaintiff layed upon the Table twenty ſhillings, and deſired him to take as much as was due to him, and all that was in the houſe of the Official; But he would receive nothing there, but appointed the Plaintiff to come in Court, where he would receive his Fees, and accordingly the Plaintiff came to him in Court, and prayed to have the ſaid Will proved; And the Defendant required the ſaid Nicke his Miniſter, to take of him for the probation, inſinuation, regiſtring, and ſealing, fourteen ſhillings ten pence, and thereupon he put the Seale of his Office to the ſaid Parchment ingroſſed, which the Plaintiff brought with him, and which he delivered to the Defendant. And it was objected, That this Caſe was out of the ſaid Statute, for thereby as to this purpoſe, it is probided, viz. And where the Goods of the Teſtator, &c. amount above the value of forty pounds, That then the Biſhop, nor Ordinary by him or themſelves, nor any of his or their Regiſters, Scribes, Prayſers, Summoners, Apparators, or any other their Miniſters, for the probation, inſinuation, and approbation of any Teſtament or Teſtamens, &c. for the regiſtring, ſealing, writing, prayſing, making of Inventories, making Acquittances, Fines, or any thing concerning the ſame Probate of Teſtaments, ſhall take or cauſe to be taken of any perſon or perſons, but only five ſhillings, and not above, whereof to the Biſhop, Ordinary, &c. for him and his Miniſters two ſhillings ſix pence, and not above, and two ſhillings ſix pence to the Scribe for Regiſtring of the ſame, &c. And it was objected by the Councell of the Defendant, that the Defendant did not take the fourteen ſhillings ten pence for the probation, inſinuation, regiſtring, or ſealing of the Teſtament, for no Probate was written upon the Teſtament it ſelf, nor any Seale put to it, but the Teſtament was ingroſſed in Parchment, and the Probat and Seale put to the Tranſcript ingroſſed, and not to the Teſtament it ſelf, and ſo out of the Statute; and the Statute extends only, when the Probat and Seale is put to the Teſtament it ſelf, and for the ingroſſing of it after the Probate, no certain Fee is probided by the Statute; But for the Regiſtring of it after it is proved, there is an expreſſe Fee in the Statute: But I conceived that the ſaid taking of the fourteen ſhillings ten pence in the Caſe at Bar, was directly againſt the Statute. For the Act is in the Negative, and if the Executor requireth the Teſtament to be ingroſſed in Parchment, he ought to agree with him whom he requireth to do it, as he may: But the Ordinary, Official, &c. ought not to exact any Fee for the ſame of the party as a thing due to him, for divers Cauſes:

1. Becauſe the words of the Act are expreſſed, for the Probation, &c. and for the regiſtring, ſealing, writing, prayſing, making of Inventories, Fines, giving of Acquittances, &c. which (writing) extends expreſſly to this Caſe.

2. The words are, Or any thing concerning the same Probate, and when the Seal and Probate is put to the Transcript, the same without question concerns the Probate, for the Probate is not put to any writing but onely to that, therefore the same concerns the Probate.

3. Such a construction should make the Act idle and vain, for if the Ordinary, Official, &c. might take as much as he pleaseth for the ingrossing done by his Ministers as a Fee due to him, all the purview of the Statute which is penned so precisely concerning persons, scil. Bishops, Ordinaries, and all persons who have power to probe Wills and Testaments, Registers, Scribes, Summoners, Apparators, or any other the Ministers, as for the thing it self, scil. the probation, insinuation, approbation, registring, sealing, writing, praying, making of Inventories, Fines, giving of Acquittances, or any other thing concerning the same, should be all in vain, by that evasion of Transcribing of it, as well against the expresse Letter of the Act as the intention and moving of it: Also the Statute saith five shillings, and not above, so as the manner of precise penning of it excludes all nice evasions: And the Act ought to be expounded to suppresse Extortion, which is a great affliction, and impoverishing of the poor Subjects.

4. As this Case is, he annexeth the Probate and Seal to the Transcript ingrossed, which the Plaintiff brought with him and offered to the Defendant; so as the Case at Bar was without question, And generally the Ordinary, Official, &c. cannot exact or take any Fee for any thing which concerns the Probate of a Will or Testament, but that which the Statute limits: And afterwards the Jury found for the Plaintiff, and of such opinion was Walmesley, Warberton, Daniel, and Foster Justices, the next term in all things, But upon exception in Arrest of Judgment for not pursuing of the Act, in the Information, Judgment is not yet given, &c.

X. Hilar. Anno 6 Jacobi Regis. In the Common Pleas.

Aide to make the Kings eldest Son Knight.

NOta that in this Term, a Question was moved to the Court, which was this: If Tenant in Burgage should pay Ayde unto the King to make his eldest Son Knight. And the point rests upon this, If the Tenure in Burgage be a Tenure in Socage; For by the ancient Common Law every Tenant in Knights Service, and every Tenant in Socage, was to give to his Lord a reasonable Ayde to make his eldest Son a Knight, and to marry his eldest Daughter, and that was incertain at the Common Law, and also incertain when the same should be paid. And this appeareth by Glanvil, Lib. 9. cap. 8. fol. 70. who wrote in the time of Henry the second, Nihil autem certum statutum est de hujusmodi auxiliis dandis, vel exigendis, &c. sunt alii præterea Casus in quibus licet Dominis auxilia solvenda sunt certa forma præscripta ab hominibus suis ut filius suus & hæres fiat miles, vel si primogenitam suam filiam maritaverit, &c. And in the beginning of the Chapter, it is called Rationabile Auxilium, because that then it was not certain, but to be moderated by reason in respect of Circumstances: And by the Preamble of the Statute of Westmin. 1. An. 3 E. 1. cap. 36. where it is said, Forasmuch as before that time reasonable Ayde to make ones Son Knight, or to marry his Daughter, was never put in certain,

Vide F. N. B. 82. ac.

See the statute of 27 H. 8. cap. 10. of uses in the Preamble, concerning Aides, to make the eldest Son Knight, and to marry the Daughter.

certain, nor when the ſame ought to be payd, nor how much be taken; the ſaid Act put the ſaid two incertainties to a certainty. 1. That for a whole Knights Fee there be taken but 20 s. and of 20 l. Lands holden in Socage 20 s. and of more, more, and of leſs, leſs, according to the rate; by which the Aid it ſelf was ſet certain. 2. That none might levy ſuch Aid, to make his ſon a Knight, untill his ſon be of the age of fifteen years; nor to marry his daughter, untill ſhe be of the age of ſeven years. And Fleta, who wrote after the ſaid Act, calls them rationabilia auxilia ad filium militem faciendum, vel ad filiam primogenitam maritandum: And by the Statute of 25 E. 1. where it is provided, That no Taxes ſhall be taken but by common conſent of the Realm, there is an exception of the ancient Aids, &c. which is to be intended of theſe Aids due unto the King by the ancient Common Law: But notwithſtanding the ſaid Act of Weſtm. 1. it was doubted, whether the King, becauſe he is not expreſly named, were bound by it; and therefore in the twentieth year of E. 3. the King took an Aid of 40 s. of every Knights Fee for to make the Black Prince Knight, and nothing then of Lands holden in Socage; and to take away all queſtion concerning the ſame, the ſame was confirmed to him in Parliament: and afterwards, anno 25 E. 3. cap. 11. it is enacted, That reaſonable Aid to make the Kings eldeſt Son Knight, and to marry his eldeſt Daughter, ſhall be demanded and levyed after the form of the Statute made thereof, and not in other manner, that is to ſay, Of every Fee holden of the King without Mean 20 s. and no more, and of every 20 l. Land holden of the King without Mean in Socage 20 s. and no more. Now Littleton, lib. 2. cap. 10. fol. 36. b. Burgage Tenure is, where an ancient Borough is, of which the King is Lord; and thoſe who have Tenements within the Borough, hold of the King their Tenements, that every Tenant for his Tenement ought to pay to the King a certain Rent: and ſuch Tenure is but Tenure in Socage; and all Socage Land is contributary to Aid, and therefore a Tenant in Burgage ſhall be contributary to it.

And it is to be obſerved, and ſo it appeareth in the Regiſter, fo. 1, & 2. That in a Writ of Right, if the Lands or Tenements are holden by Knights ſervice, it is ſaid, Quas clamat tenere de te per ſervitium unius feodi Militis: and if the Lands be holden in Socage, the Writ is, Quas clamat tenere de te per liberum ſervitium unius libræ cumini, &c. ſo as Socage Tenure in all Writs is called Liberum ſervitium. And by the Writ of Aid, Fitz. N. B. 82. it is commanded to the Sheriff, Quod juſte, &c. facias habere A. rationabile Auxilium de Militibus, & liberis tenentibus ſuis in Baliva tua, &c. ſo as the ſame Writ makes a diſtinction of Knights ſervice by the name of Militibus, and of Socage by the name of Liberis tenentibus. And in the Regiſter, fol. 256. the Writ of Right for a Houſe in London (which is holden of the King in Burgage) is in theſe words, Rex, Majori, vel Cuſtodi & Vicecom. London: Præcipimus vobis quod ſine dilatione teneatis G. de uno Meſſuagio, &c. in London, quæ clamat tenere de nobis per liberum ſervitium, &c. which proves, That Tenure in Burgage is a Tenure in Socage: But it appeareth by the Books of Avowry 26. and 10 H. 6. ſo Ancient Demeſne 11. it was reſolved by all the Juſtices in the Exchequer Chamber, That no Tenure ſhould pay for a reaſonable Aid to marry the Daughter, or to make the Son a Knight, but Tenure by Knights ſervice, and Tenure by Socage; but not Tenure by Grand-ſerjeanty, nor no other: and 13 H. 4. 34. agrees to the Caſe of Grand-

ſerjeanty: and by the ſaid Books it appeareth, that Tenure by Frankalmoign, and Tenure by Divine Service, ſhall not pay, for they are none of them: but Tenure in Burgage is a Tenure in Socage; and therefore the ſaid Books prove, that ſuch a Tenure ſhall pay Ayd. And I conceive, that Tenure by Petit-Serjeanty ſhall pay alſo Ayd: for Litt. lib. 2. cap. 8. fo. 36. ſays, that ſuch a Tenure is but Socage in effect: but Fitz. N. B. 83. a. abouccheth, 13 H. 4. 34. That Tenant by Petit-Serjeanty ſhall not pay Aid; but the Book onely extends to Grand-Serjeanty: If the Houſes in a City or Borough are holden of the King in Burgage, and the King grant the Seignories to one, and the City or Borough to another to hold of him, then thoſe Houſes ſhall not be contributary to Aid, for they are not immediately holden of the King, as is required by the Law.

And I conceive that he who holdeth a Rent of the King by Knights ſervice, or in Socage, ſhall pay Ayd; for the words of the Act of Weſtm. 1. cap. 35. are, From henceforth of a whole Knights Fee onely be taken 20 s. of 20 l. Land holden in Socage 20 s. and the Plea is ſaid in ſuppoſition of Law to hold the Land: and it is not reaſon that the Tenant by his Feoffment before the Statute ſhould prejudice the Lord of his benefit. And although it was ſaid, that a Tenure in Socage, is ſervitium Socæ, as Littleton ſaith, and the ſame cannot be applyed to Houſes: to that it was anſwered, That the Land upon which the houſe is built, or if the Houſe falleth down, may be made arable, and be ploughed. And a Rent may be holden in Socage, and yet it is not ſubject to be plowed, but by a poſſibility after words eſcheat to the Lord of the Land. See Huntington, Polydor Virgil, and Hollinſheds Chronicle, fol. 35. 15 H. 4. Ayd was levyed by Hen. 7. 1. to marry Mawd his eldeſt Daughter to the Emperor, viz. 3 l. of every Fide of Land, &c. And ſee The Grand Cuſtomary of Normandy, cap. 35. there is a Chapter of Ayds, whereof the firſt is, to make the eldeſt Son of his Lord a Knight; and the ſecond to marry his eldeſt Daughter. And ſee a Statute made in anno 19 H. 7. which beginneth thus, Item præfati Communes in Parliamento prædicto exiſtentes ex aſſenſu dominorum Spiritualium & Temporalium in dicto Parliamento ſimiliter exiſtent. conceſſerunt præfato Regi quandam pecuniæ ſummam in loco duorum rationabilium auxiliorum ſuæ Majeſtati de jure debit. tam ratione creationis nobiliſſimi filii ſui primogeniti bonæ memoriæ, Domini Arthuri nuper Principis Walliæ, quam ratione Matrimonii & traductionis nobiliſſimi Principis Margaritæ filiæ ſuæ primogenit. quam etiam multiplicare pro Regni ſui perpetua pace & tranquillitate, &c. certis viis & modis levand. cujus quidem conceſſionis Tenor, &c. ſequitur in hæc verba: For as much as the King our Soveraign Lord is rightfully intituled to have two reaſonable Aids according to the Laws of this Land, the one for the making Knight the right honorable his firſt begotten Son Arthur, late Prince of Wales deceaſed, and the other, for the marriage of the right Noble Princeſs his firſt begotten Daughter Margaret, now married to the King of Scots: and alſo that his Highneſs hath born great and ineſtimable charges for the defence of the Realm, &c. conſidering the premiſſes; And if the ſame Ayds ſhould be levyed, and paid by reaſon of their Tenures according to the ancient Laws of the Land, ſhould be to them doubtful and uncertain, and great unquietneſs, for the ſearch and not knowledge of their ſeveral Tenures, and their Lands chargeable to the ſame, have made humble Petition unto his Highneſs, graciouſly to accept and take of them the ſum of 40000 l.

as

as well in recompence and ſatisfaction of the ſaid two Ayds, as for the ſaid great and ineſtimable charges, &c. as is aforeſaid. The King, to eſchew and avoyd the great vexation, troubles and unquietneſs which to them ſhould have enſued, if the ſaid Ayds were levyed after the ancient Laws: and for the good and acceptable ſervices of the Nobles of this Realm, and other his faithful Subjects, in their own perſons and otherwiſe, done to his Grace, and thereby ſuſtained manifold coſts and charges, to his great honor and pleaſure, doth pardon the ſaid two Ayds, and accepteth the offer aforeſaid: and that the reſt of his ſaid Commons ſhould not be contributary to the ſaid ſum of 40000 l. hath pardoned 10000 l. parcel thereof, and doth accept of 30000 l. in full ſatisfaction, &c. And that the Cities and Boroughs, Towns and places, being in every Shire not by themſelves accountable in the Exchequer for Fifteens and Tenths, be chargeable with the Shires, &c. And all Cities and Boroughs, not contributary, &c. but accountable by themſelves, &c. ſhall be chargeable by themſelves towards the payment of the ſaid 30000 l. with ſuch ſums as under the Act particularly appear, &c. And there under the Act appear the ſeveral Taxations of every ſeveral County, City, Borough, &c. and that the City of London is taxed to 618 l. 3 s. 5 d. the City of Norwich to 8 l. 6 s. 11 d. the City of Canterbury to 53 l. 13 s. 3 d. ob. Norfolk 286 l. 6 s. 10 d. Suffolk 1214 l. 5 s. 4 d. ob. &c. The ſum of all the ſums then appreſſed is 31648 l. whereof allowable for Fees and Wages of Commiſſioners and Collectors 651 l. 16 s. 2 d. and ſo remaineth 31006 l. 4 s. and 10 d. Note, that the Univerſities of Cambridge and Oxford, and the Colledg of Eaton be excepted.

See Rot. 30 H. 3. ex parte reman. Dom. Theſaur. in Scemino, in auxilio nobis conceſſ. ad primogenitam filiam noſtram maritand. And note, that King Henry the third had Ayd granted to him in Parliament ad Iſabellam ſororem ſuam Imperatori maritand. but that was of Benevolence.

Rot. 42 H. 3. ibid. 6. Monſtrat R. Johannes le Francois Baro de Scaccario, quod cum Dominus Rex non caperet niſi 20 s. de integro feodo militis de auxilio ad primogenitam filiam ſuam maritand. Radol. fil. Rad. fil. Mich. injuſte exegit de eodem 30 s. ad primogenitam filiam ſuam maritand. pro duabus partibus unius feodi militis, & averia ſua cepit, & ea detinet. Et ideo mandatum eſt Vic. Com. Bedd. & Buck. quod venire faciant, &c. prædict. R. ad reſpondendum eidem Johanni de prædict. tranſgreſſione, & prædict. averio, &c. Note, it appeareth by this, that ſome held, that the Statute of Weſtm. 1. aforeſaid was but a confirmation of the Common Law, and that the King alſo ought not to take more: but that was doubted.

Ibid. in Regno 2 E. 1. Rot. 3. de auxilio ad militiam, (which is meant of Knight of the Kings Son) in the time of Henry the third, & Iſabella Comitiſſa Albermarle, perdonata 1161 l. 8 s. 7 d. pro eodem auxilio, quia Boldwinus de Inſula frater ejus cujus hæres ipſa eſt fuit infra ætatem, & in cuſtodia ejus: & quia tenentes dictæ Iſabellæ onerentur per ſervitium militare de prædict. pecuniis. Note, that that was before the Statute of Weſt. 1. and by that it appeareth, that if one within age be in Ward of the King, he ſhall not be contributary to Ayd, but his Tenants which hold of him (and then held of the King by reaſon of Ward) ſhall pay Ayd unto the King, as it appeareth by that Record.

Ibid. 30 E. 1. Rex dilectis & fidelibus, Vic. Kanc. & Rico. de R. ſalutem,

Note, that this double charge was in respect that they were discharged of any contribution for Socage, which I conceive was for the difficulty to find the Socage Tenure.

salutem, Sciatis, quod in primo die Junii anno Regni nostri 18. Prælati, Comites, Barones, & cæteri Magnates, de regno nostro conceditur, pro se & tota communitate ejusdem Regni in pleno Parliamento nostro, nobis concesserunt 40 s. de singulis feodis militum in dicto Regno ad auxilium ad primogenitam filiam nostram maritand. levandos, sicut hujusmodi auxilium alias in casu consimil. levari consuevit, cui quidem levationi faciend. pro dicta communitatis easiamento hucusque supersedimus faciend. gratiose assignavimus vos ad prædictum auxilium, &c. Note that his eldest Daughter was marryed to the Earl of Bar.

Ibid. T. R. 34 E. 1. De auxilio concesso ad militiam filii Regis.

Ibid. Hill. 4 H. 4. Rot. 19. de rationabili auxilio de Will. Domino Roos, for the marriage of Blanch the Kings eldest Daughter, out of the Manor of Wragby in the County of Lincoln: The like M. Rot. 5 H. 4. Rot. 33. Lincoln. and Rot. 34. Lincoln. and Rot. 35. Lincoln. and Tr. R. 5 H. 4. Rot. 2. Kanc. and Rot. 3. Kanc. and Rot. 5. Kanc.

See ibid. P. R. 21 E. 3. Rot. Cantab. de auxilio ad filium Regis primogenitum milit. faciend. per Episcopum Elienſem: by which it appeareth, that a Bishop for his Lands which he holdeth by Knights service, or Socage, shall pay Ayd: but those who hold by Frankalmoign, or by Divine service, shall not pay Ayd, as before is said.

See ibid. 20 E. 3. Rot. 13, and 14. de auxiliando ad primogenitum filium Regis militem faciend. and Collectors thereupon appointed. By all which before cited, it appeareth, that Tenure in Burgage is subject to the payment of Ayd. And note, that a great part of London was Abby or Chauntry Land, and the Lands of persons attainted: and all those which are immediately holden of the King by Knights service, or in Socage, shall be contributary to the payment of Ayd, &c.

XI. Hill. 6 Jacobi Regis. Prohibitions.

UPon Wednesday, being Ashwednesday, the day of February, 1606. A great Complaint was made by the President of York unto the King, That the Judges of the Common Law had, in contempt of the Command of the King the last Term, granted sixty or fifty Prohibitions at the least out of the Common-Pleas to the President and Councel of York after the sixth day of February, and named three in particular, (scil.) one between Bell and Thawptes, another between Snell and Huet, and another in an Information of a Riotous Rescue preferred by English Bill by the Attorny General against Christopher Dickenson, one of the Sheriffs of York, and divers others, in rescuing of one William Watson out of the Custody of the Deputy of one of the Pursuivants of the same Councel who had arrested the said Watson by force of a Commission of Rebellion awarded by the President and Councel, which Prohibition in the said Information was (as was affirmed) denyed upon a motion made in the Kings Bench the last Term, and yet granted by us. And the King sent for me to answer to that Complaint: and I onely, all the rest of the Justices being absent, waited upon the King in the Chamber near the Gallery; Who, in the presence of Egerton Lord Chancellor, the Earl of Salisbury Lord Treasurer, the Lord of Northampton Lord Privy Seal, the Earl of Suffolk Lord Chamberlain, the Earl of Worcester, the Archbishop of Canterbury, the Lord Wotton, and others of his Councel, rehearsed to me the Complaint aforesaid: and I perceived well, that upon the said

ſaid Information he had conceived great diſpleaſure againſt the Judges of the Common Pleas, and chiefly againſt me; To which I (having the Copy of the Complaint ſent to me by the Lord Treaſurer the Sabbath day before) anſwered in this manner, That I had, with as much brevity as the time would permit, made ſearch in the Offices of the Preignothories of the Common Pleas: and as to the ſaid Caſes between Bell and Thawptes, and Snell and Huer, no ſuch could be found: but my intent was not to take advantage of a Miſpriſal: and the truth was, that the ſixth day of February the Court of Common Pleas had granted a Prohibition to the Preſident and Councel of York, between Lock Plaintiff, and Bell and others Defendants: and that was, a Replevin in Engliſh was granted by the ſaid Preſident and Councel, which I affirmed was utterly againſt Law: For at the Common Law no Replevin ought to be made, but by Original Writ directed to the Sheriff. And the Statute of Marlbridge cap. 21. and Weſt. 1. cap. 17. hath authoriſed the Sheriff upon Plaint made to him, to make a Replevin; and all that appeareth by the ſaid Statutes, and by the Books of 29 E. 3. 21. 8 Eliz. Dyer 245. And the King neither by his Inſtructions had made the Preſident and Councel Sheriffs, nor could grant to them power to make a Replevin againſt the Law, nor againſt the ſaid Acts of Parliament; but the ſame ought to be made by the Sheriff. And all that was affirmed by the Lord Chancellor for very good Law: And I ſay, that it might well be that we have granted other Prohibitions in other Caſes of Engliſh Replevins. Another Prohibition I confeſſe we have granted between Sir Bethel Knight, now Sheriff of the County of York, as Executor to one Stephenſon, who had made him and another his Executors, and preferred an Engliſh Bill againſt Chambers, and divers others in the nature of an Action upon the Caſe, upon a Trover and Converſion in the life of the Teſtator of goods and Chattels, to the value of 1000 l. and becauſe the other Executor would not join with him, although he was named in the Bill, he had not any remedy at the Common Law, he prayed remedy there in Equity: and I ſay, that the Preſident and Councel have not any authority to proceed in that Caſe, for divers cauſes.

1. Becauſe there is an expreſſe limitation in their Commiſſion, that they ſhall not hold plea between party and party, &c. unleſs both parties, or one of them, tanta paupertate ſunt gravati, that they cannot ſue at the Common Law: and in that Caſe the Plaintiff was a Knight, and Sheriff, and a man of great ability.

2. By that Suit the King was deceived of his Fine, for he ought to have had 200 l. Fine, becauſe that the damages amounted to 4000 l. and that was one of the cauſes that the Sheriff began his Suit there, and not at the Common Law: another cauſe was, that their Decrees which they take upon them are final and uncontroulable, either by Error, or any other remedy. And yet the Preſident is a Noble man, but not learned in the Law; and thoſe which are of the Councel there, although that they have the countenance of Law, yet they are not learned in the Law; and nevertheleſs they take upon them finall and uncontroulable Decrees in matters of great importance: For if they may deny Relief to any at their pleaſure without controulment, ſo they may do it by their finat Decrees without Error, Appeal, or other remedy: which is not ſo in the Kings Courts where there are five Judges; for they can deny Juſtice to none who hath Right, nor give any Judgment, but the ſame is controulable by a Writ of Error, &c.

And

And if we ſhall not grant Prohibitions in Caſes where they hold Plea without authority, then the Subjects ſhall be wrongfully oppreſſed without Law, and we denied to do them Juſtice: And their ignorance in the Law appeared by their allowance of that Suit, ſcil. That the one Executor had no remedy by the Common Law, becauſe the other would not joyn in ſuit with him at the Common Law: whereas every one learned in the Law knoweth, that ſummons and ſeverance lyeth in any Suit brought as Executors: and this alſo in that particular Caſe was affirmed by the Lord Chancellor; and he much inveighed againſt Actions brought there upon Trover and Converſion, and ſaid, that they could not be found in our ancient Books.

Another Prohibition I confeſſe we have granted, between the L. Wharton, who by Engliſh Bill ſued before the Councel, Banks, Buttermere, and others, for fiſhing in his ſeveral Fiſhings in Darwent in the County of C. in the nature of an Action of Treſpaſſe at the Common Law, to his damage of 200 l. And for the cauſes next before recited, and becauſe the ſame was meerly determinable at the Common Law, we granted a Prohibition, and that alſo was allowed by the Lord Chancellor. And as to the Caſe of Information upon the Riotous Reſcous, I having forgotten to ſpeak to that, the King himſelf asked what the Caſe was? to whom I anſwered, that the Caſe was, That one exhibited a Bill there in the nature of an Action of Debt, upon a Mutuatus againſt Watſon, who upon his Oath affirmed, that he had ſatisfied the Plaintiff, and that he owed him nothing, and yet becauſe the Defendant did not deny the Debt, the Councel decreed the ſame againſt him, and upon that Decree the Purſuivant was ſent to arreſt the ſaid Watſon, who arreſted him, upon which the Reſcous was made: and becauſe that the Suit was in the nature of an Action of Debt upon a Mutuatus at the Common Law, and the Defendant at the Common Law might have waged his Law, of which the Defendant ought not to be barred by that Engliſh Bill, quia beneficium juris nemini eſt auferendum: the Prohibition was granted; and that was affirmed alſo by the Lord Chancellor: whereupon I concluded, that if the principal cauſe doth not belong unto them, all their proceedings was coram non Judice, and then no reſcous could be done: but the Lord Chancellor ſaid, that though the ſame cannot be a Reſcous, yet it was a Riot, which might be puniſhed there: which I denied, unleſſe it were by courſe of Law by force of a Commiſſion of Oyer and Terminer, and not by an Engliſh Bill: but to give the King full ſatisfaction in that point, the truth is, the ſaid Caſe was debated in Court, and the Court inclined to grant a Prohibition in the ſaid caſe; but the ſame was ſtayed to be better adviſed upon, ſo as no Prohibition was ever under Seal in the ſaid Caſe.

Alſo I confeſſe, that we have granted divers Prohibitions to ſtay Suits there by Engliſh Bill upon penal Statutes: for the manner of proſecution, as well for the Action, Proceſs, &c. as for the Count, is to be purſued, and cannot be altered, and therefore without queſtion the Councel in ſuch caſes cannot hold Plea, which was alſo affirmed by the Lord Chancellor. And I ſaid, that it was reſolved in the Reign of Queen Eliz. in Parots Caſe, and now lately in the Caſe of the Preſident and Councel of Wales, That no Court of Equity can be erected at this day without Act of Parliament, for the reaſons and cauſes in the Report of the ſaid Caſe of Parot.

And the King was well ſatisfied with theſe reaſons and cauſes of our

our proceedings, who of his Grace gave me his Royall hand, and I departed from thence in his favour. And the ſurmiſe of the Number, and that the Prohibition in the ſaid Caſe in the Information was denied in the Kings Bench, was utterly denied: for the ſame was moved when two Judges were in Court, who gave not any opinion therein, but required Serjeant Hutton who moved it, to move the ſame again when the Court was full, &c.

XII. Paſch. 7 Jacobi Regis.

NOte, that this Term a Queſtion was moved at Serjeants-Inn: Who by the Common Law ought to repair the Bridges, common Rivers, and Sewers, and the High-wates, and by what means they ſhall be compelled to it; and firſt of the Bridges: And as to them it is to be known, That of common Right all the Country ſhall be charged to the Reparation of a Bridge, and therewith agreeth 10 E. 3. 28. b. That a Bridge ſhall be levied by the whole Country, becauſe it is a common Eaſement for the whole Country, and as to that Point, the Statute of 22 H. 8. cap. 5. was but an affirmance of the Common Law: And this is true, when no other is bound by the Law to repair it, but he who hath the Toll of the men or Cattell which paſs over a Bridge or Cauſey, ought to repair the ſame, for he hath the Toll to that purpoſe, Et qui ſentit commodum ſentire debet & onus: and therewith agrees 14 E. 3. Barr. 276. Alſo a man may be bounden to repair a Bridge, ratione Tenuræ of certain Land, But a particular perſon cannot be bound by preſcription, ſcil. That he and all his Anceſtors have repaired the Bridge, if it be not in reſpect of the Tenure of his Land, taking of Toll, or other profit; for the Act of the Anceſtor cannot charge the Heir without profit. But an Abbot or other Corporation who hath a lawfull being may be charged, ſcil. That he and his Predeceſſors time out of mind, &c. have repaired the Bridge; For the Abbot and Covent may bind their Succeſſors, vide 21 E. 4. 28. 27 E. 3. 8. 22 Aſſ. 8. 5 H. 7. 3. And if an Abbot and his Predeceſſors time out of mind have repaired a Bridge of Almes, they ſhall be compelled to repair it; and therewith agreeth 10 E. 3. 28. So it is of a High-way of common Right, all the Country ought for to repair it, becauſe that the Country have their eaſe and paſſage by it, which ſtands with the reaſon of the Caſe of the Bridge, but yet ſome may be particularly bounden to repair it as is aforeſaid. He who hath the Land adjoyning, ought of common Right without preſcription to ſcour and cleanſe the Ditches, next to the way to his Land: and therewith agreeth the Book of 8 H. 7. 5. But he who hath Land adjoyning without preſcription, is not bound to repair the way. So of a common River, of common Right all who have eaſe and paſſage by it, ought to cleanſe and ſcour it; For a common River is as a common Street, as it is ſaid in 22 Aſſ. and 37 Aſſ. 10. But he who hath Land adjoyning to the River is not bounden to cleanſe the River, unleſs he hath the benefit of it, ſcil. a Toll, or a Fiſhing, or other profit. See 37 Aſſ. p. 10.

XIII. Paſch. 7 Jacobi.

Sir William Reades and Boothes Caſe.

IN the great Caſe in the Star-Chamber, of a Forgery, betwæn Sir William Read Plaintiff, and Roger Booth, and Cutbert Booth, and others Defendants: the Caſe was this;

The ſaid Roger Booth 38 Eliz. was convicted in that Court of the publication of a Writing under Seal, forged in the name of Sir Thomas Greſham, of a Rent-charge of a hundred pounds, out of all his Lands and Tenements, to one Markham for ninety nine years, bearing date the one and twentieth year of Quæn Elizabeth; the ſaid Roger knowing it to be forged. And afterwards the ſaid Sir William Reade exhibited the ſaid Bill againſt the ſaid Boothes, and others, for forging of another writing under Seal bearing date the twentieth of Eliz. in the name of the ſaid Sir Thomas Greſham, purporting a Dæd of Feoffment of all his Lands (except certain) to Sir Rowland Heyward and Edward Hoogon and their Heirs, to certain uſes, which was in effect to the uſe of Markham the younger and his Heirs: And for the publication of the ſaid Writting, knowing the ſame to be forged, was the Bill exhibited. And now upon the hearing of the Cauſe in the Star-Chamber this Term, theſe doubs were moved upon the Statute of 5 Eliz. 1. If one who is convicted of publication of a Dæd of Feoffment or Rent-charge, knowing the ſame to be forged, again at another day forge another Dæd of Feoffment, or Rent-Charge, if he be within the caſe of Felony within the ſaid Act, (which doubt ariſeth upon theſe words (eſtſoons) committed again any of the ſaid Offences) And therefore it was objected, that he ought to commit again the ſame nature of Offence, ſcil. If he were convicted of Forgery he ought to forge again, and not onely publiſh, knowing, &c. And if firſt he were convicted of publiſhing, knowing, &c. he ought to offend again in publication, knowing, &c. and not in Forgery, for (eſtſoons) which is (iterum) implyeth that it ought to be of the ſame nature of Offence. The ſecond doubt was, If a man committed two Forgeries, the one in 37 of Eliz. and the other in 38. and he is firſt convicted of the laſt, if he may be now impeached for the firſt. The third doubt was, when Roger Booth was convicted in 38 Eliz. and afterwards is charged with a new Forgery in 37 Eliz. If the Witneſſes proving in truth that it was forged after the firſt conviction, if the Star-Chamber hath Juriſdiction of it. The laſt doubt was, when Cutbert Booth who never was convicted of Forgery before, if in truth the Forgery was done, and ſo proved in 38 Eliz. if he might be convicted upon this Bill, becauſe that the Forgery is alledged before that it was done. As to the firſt and ſecond doubts, it was reſolved by the two chief Juſtices and the chief Baron, that if any one be convicted of Forgery or publication of any Writing concerning Freehold, &c. within the firſt Branch; or concerning Intereſt or Term for years, &c. within the ſecond Branch, and be convicted, if afterwards he offend either againſt the firſt Branch or ſecond, that the ſame is Felony: As if he Forgeth a Writing concerning intereſt for years within the ſecond branch, and be convicted, and afterwards he forgeth a Charter of Feoffment within the firſt branch, or è converſo,

that

that that is Felony, and that by expresse words of the Act: That if any person or persons being hereafter convicted or condemned of any of the said Offences, (which words, any of the said Offences, extend to all the Offences mentioned before, either in the first branch, or in the second branch) by any the wales or means above limited, shall after any such conviction or condemnation, eftsoons commit or perpetrate any of the said Offences, in form aforesaid, which words, Any of the said Offences, &c. do extend to the nature of all the Offences mentioned in the first and second Branches: But if one forge a Writing in 37. of Eliz. and afterwards he forge another in 38. of Eliz. yet it is not Felony, although that he forgeth many Writings one after the other, for by the expresse words of the Act, it is not Felony. The Forgery, &c. which is Felony by the Act, ought to be after conviction or condemnation of a former Writing. As to the third doubt, it was resolved, That the allegation of the time by the Plaintiff in the Bill, shall not alter the Offence, but shall give unto the Court Jurisdiction: but if it appeareth to the Court, that the Forgery or Publication was after the Sentence, then the Court shall surcease. As to the last Point, it was resolved, that the time of the Forgery is not materiall, be it before or after the Offence in truth committed, if it be committed before the exhibiting of the Bill; but if the date of the Writing supposed to be forged, had been mistaken, there the Defendant could not be condemned of a Deed of another date, for that is not the Offence complained of in the Bill, of which the Court can give Sentence.

XIV. Pasch. 7 Jacobi Regis.

The Case of Sewers.

THe Case was, That there was a Cawsey, or Mill-stank of Stone in the River of Dee and City of Chester, which Cawsey before the Raign of King Edward the first, was erected for the necessary maintenance of certain Mills, some of the Kings, and others of the Subiects at the end of the said Causey: and now a certain Decree was made by certain Commissioners of Sewers, for a breach to be made by ten Poles in length in the said Cawsey, which Cawsey as it was admitted by both parties was erected before the Raign of King Edward the first, and so hath continued untill this day without any exaltation or inhansing: and if by any Decree of the Commissioners by force of any Statute, any breach may be made in that Cawsey, was the Question. And it was referred by the Letters of the Lords of the Privy Councell, to the two chief Justices, and the chief Baron; and upon hearing of Councell learned at divers dates, and good consideration had in the time of the last Vacation, of all the Statutes concerning Sewers, and upon conference had among themselves, it was resolved as followeth.

1. Whereas it is provided by the Statute of Magna Charta, cap. 23. Quod omnes Kidelli deponantur de cætero per Thamesiam, & Medewei-am & per totam Angl. nisi per Costeram Maris. It was resolved, That that Stat. extended only to Kidells, sc. open Wears for taking of Fish; but the first Statute which extended to pulling down, or abating of any Mills, Mill-stankes, and Causeys, was the Statute of 25 E. 3. cap. 4. which Act appointed such only to be thrown down or abated, which were levied or erected in the Raign of King Edward the first, or after:

But by the Statute made An. 1 H. 4. cap. 12. upon complaint in Parliament of the great damages which have risen by the outrageous inhanting of Mills, Mill-stanks, and other impediments made and erected before the Raign of King Edward the first: The said old Mills and Mill-stanks were appointed by Act then made to be surveyed, and such as were found to be much inhanced to be corrected and amended; saving alwaies reasonable substance of such Mills, Mill-stanks, Wears, &c. so in old time made and levied: None of which Acts extended to the Case in question; For that Cawsey was erected before the Raign of Edward the first, and never exalted or inhanced after the erection of it: And the Statute of 12 H. 4. cap. 7. doth confirm all the said Acts; and by them the generality of the Act of Magna Charta is restrained, as by the said Acts appeareth. And by the statute of 23 H. 8. cap. 5. None of the said Acts as to the Case in question is repealed; for first, the same Act appoints the manner, form, tenor, and effect of the Commission of Sewers, by which power is given to the Commissioners to survey Walls, &c. Fences, Cawseys, &c. Mills, &c. and then to correct, repair, amend, pull down or overthrow, or reform, as cause requireth, according to their wisdomes and discretions; and therein as well to ordain and do after the form, tenor, and effect of all and singular the Statutes and Ordinances made before the first of March, in the twenty third year of Henry the eighth, as also to inquire by the Oathes of honest and lawfull men, &c. through whose default the said hurts and damages have happened, &c. By which it appeareth, That the discretion of the Commissioners was limited, scil. to proceed according to the statutes and Ordinances before made, &c. And also to reform, repair, and amend the said Walls, &c. by force of that word (said) hath relation to the precedent purview of the Act, &c. And further to reform, prostrate and overthrow all such Mills, &c. and other impediments and annoyances (aforesaid) as shall be found by Inquisition, or by your survey and discretion to be excessive, i. e. hurtfull; which word (aforesaid) refers that clause also to the precedent purview, scil. such impediments and annoyances as are against the Statutes and Ordinances before made. Also it is further provided by the same Act, That all and every Statute, Act, and Ordinance heretofore made concerning the Premisses or any of them, not being contrary to this present Act, nor heretofore repealed, shall from henceforth stand and be good and effectuall for ever. But the said Acts of 25 E. 3. and 1 H. 4. are not contrary to any clause of that Act, nor were repealed before: And alwaies such construction ought to be made, that one part of the Act may agree with another, and all to stand together: and if they had intended a repeal of the said former Acts, they would not have repealed them by such generall and doubtfull words, when they concerned the Inheritances of many Subiects: and according to this resolution we certified the Lords of the Councell, that the said Statutes of 25 E. 3. and 1. of H. 4. remained yet in force; and that the Authority given by the Commission of Sewers, did not extend to Mills, Mill-stanks, Cawseys, &c. erected before the Raign of King Ed. 1. unless that they have been inhanced and exalted above their former height, and thereby made more prejudiciall, &c. In which case they are not to be overthrown or subverted, but to be reformed by abating the excesse and inhaunsment only.

Trinit.

Trinit. 7 Jacobi Regis.

XIV. The Case De Modo Decimandi, and of Prohibitions, debated before the Kings Majesty.

RIchard, Archbishop of Canterbury, accompanyed with the Bishop of London, the Bishop of Bathe and Wells, the Bishop of Rochester, and divers Doctors of the Civil and Canon Law, as Dr. Dunn, Judge of the Arches, Dr. Bennet Judge of the Prerogative. Dr. James, Dr. Martin, and divers other Doctors of the Civil and Canon Law came attending upon them to the King to Whitehall the Thursday, Friday, and Saturday after Easter-Term, in the Councell-Chamber; where the Chief Justice, and I my self, Daniel Judg of the Common-Pleas, and Williams Judg of the Kings-Bench, by the command of the King attended also: where the King being assisted with his Privy Councel, all sitting at the Councel Table, spake as a most gracious, good, and excellent Soveraign, to this effect: As I would not suffer any novelty or Innovations in my Courts of Justice Ecclesiastical and Temporal; so I will not have any of the Laws, which have had judicial allowances in the times of the Kings of England before me, to be forgotten, but to be put in execution. And for as much as upon the contentions betwæn the Ecclesiastical and Temporal Courts great trouble, inconvenience and loss may arise to the subjects of both parts, namely when the controversie ariseth upon the jurisdiction of my Courts of ordinary Justice; and because I am the head of Justice immediately under God, and knowing what hurt may grow to my Subjects of both sides, when no private case, but when the Jurisdictions of my Courts are drawn in question, which in effect concerneth all my Subjects, I thought that it stood with the Office of a King, which God hath committed to me, to hear the controversies betwæn the Bishops and other of his Clergy, and the Judges of the Laws of England, and to take Order, that for the good and quiet of his Subjects, that the one do not encroach upon the other, but that every of them hold themselves within their natural and local jurisdiction, without encroachment or usurpation the one upon the other. And he said, that the onely question then to be disputed was, If a Parson, or a Vicar of a Parish, sueth one of his Parish in the Spiritual Court for Tythes in kind, or Lay-fee, and the Defendent alledgeth a custom or prescription, De modo Decimandi, if that custom or prescription, De modo Decimandi, shall be tryed and determined before the Judg Ecclesiastical where the Suit is begun; or a Prohibition lyeth, to try the same by the common Law. And the King directed, that we who were Judges should declare the reasons and causes of our proceedings, and that he would hear the authorities in the Law which we had to warrant our proceedings in granting of Prohibition in cases of Modo Decimandi. But the Archbishop of Canterbury kneeled before the King, and desired him, that he would hear him and others who are provided to speak in the case for the good of the Church of England: and the Archbishop himself inveighed much against two things: 1. That a Modus Decimandi should be

tryed

tryed by a Jury, because that they themselves claim more or less modum Decimandi; so as in effect they were Tryors in their own cause, or in the like cases. 2. He inveighed much the precipate and hasty Tryals by Juries: and after him Doctor Bennet, Judg of the Prerogative Court, made a large Invection against Prohibitions in Causis Ecclesiasticis: and that both Jurisdictions as well Ecclesiastical as Temporal were derived from the King; and all that which he spake out of the Book which Dr. Ridley hath lately published, I omit as impertinent: and he made five Reasons, why they should try Modum Decimandi.

And the first and principal Reason was out of the Register, fo. 58. quia non est consonans rationi, quod cognitio accessarii in Curia Christianitatis impediatur ubi cognitio Causæ principalis ad forum Ecclesiasticum noscitur pertinere. And the principal cause is Right of Tythes, and the Plea of Modo Decimandi sounds in satisfaction of Tythes; and therefore the Conusance of the original cause, (scil.) the Right of Tythes appertaining to them, the Conusance of the bar of Tythes, which he said was but the accessary, and as it were dependant upon it, appertained also to them. And whereas it is said in the Bishop of Winchesters Case, in the second part of my Reports, and 8 E. 4. 14. that they would not accept of any Plea in discharge of Tythes in the Spiritual Court, he said, that they would allow such Pleas in the Spiritual Court, and commonly had allowed them; and therefore he said, that that was the Mystery of iniquity founded upon a false and feigned foundation, and humbly desired the reformation of that Error, for they would allow Modum Decimandi being duly proved before them.

2. There was great inconvenience, that Lay-men should be Tryers of their own Customs, if a Modus Decimandi should be tryed by Jurors; for they shall be upon the matter Jurors in their own cause.

3. That the custom De modo Decimandi is of Ecclesiastical Jurisdiction and Conusance, for it is a manner of Tything, and all manner of Tything belongs to Ecclesiastical Jurisdiction: and therefore he said, that the Judges, in their Answer to certain Objections made by the Archbishop of Canterbury, have confessed, that suit may be had in Spiritual Courts pro modo Decimandi; and therefore the same is of Ecclesiastical Conusance; and by consequence it shall be tryed before the Ecclesiastical Judges: for if the Right of Tythes be of Ecclesiastical Conusance, and the satisfaction also for them of the same Jurisdiction, the same shall be tryed in the Ecclesiastical Court.

4. In the Prohibitions of Modus Decimandi averment is taken, That although the Plaintiff in the Prohibition offereth to prove Modum Decimandi, the Ecclesiastical Court doth refuse to allow of it, which was confessed to be a good cause of Prohibition: But he said, they would allow the Plea De Modo Decimandi in the Spiritual Court, and therefore cessante causa cessabit & effectus, and no Prohibition shall lie in the Case.

5. He said, that he can shew many consultations granted in the cause De modo Decimandi, and a Consultation is of greater force than a Prohibition; for Consultation, as the word imports, is made with the Court with consultation and deliberation. And Bacon, Solicitor-General, being (as it is said) assigned with the Clergy by the King, argued before the King, and in effect said less than Doctor Bennet said before: but he vouched 1 R. 3. 4. the Opinion of Hussey, when the Original ought to begin in the Spiritual Court, and afterwards a

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thing cometh in issue which is tryable in our Law, yet it shall be tryed by their Law: As if a man sueth for a Horse devised to him, and the Defendant saith, that the Devisor gave to him the said Horse, the same shall be tryed there. And the Register 57 and 58. If a man be condemned in Expences in the Spiritual Court for laying violent hands upon a Clark, and afterwards the Defendant pays the costs, and gets an Acquittance, and yet the Plaintiff sueth him against his Acquittance for the Costs, and he obtains a Prohibition, for that Acquittances and Deeds are to be determined in our Law, he shall have a Consultation, because that the principal belongeth to them. 38 E. 3. 5. Right of Tythes between two spiritual persons shall be determined in the Ecclesiastical Court. And 38 E. 3. 6. where the Right of Tythes comes in debate between two spiritual persons, the one claiming the Tythes as of common Right within his Parish, and the other claiming to be discharged by real composition, the Ecclesiastical Court shall have Jurisdiction of it.

And the said Judges made humble suit to the King, That for as much as they perceived that the King in his Princely Wisedom did detest Innovations and Novelties, that he would vouchsafe to suffer them with his gracious favor, to inform him of one Innovation and Novelty which they conceived would tend to the hindrance of the good administration and execution of Justice within his Realm.

Your Majesty, for the great zeal which you have to Justice, and for the due administration thereof, hath constituted and made fourteen Judges, to whom you have committed not onely the administration of Ordinary Justice of the Realm, but crimina læsæ Majestatis, touching your Royal person, for the legal proceeding: also in Parliament we are called by Writ, to give to your Majesty and to the Lords of the Parliament our advice and counsel, when we are required: We two chief Justices sit in the Star-Chamber, and are oftentimes called into the Chancery, Court of Wards, and other High Courts of Justice: we in our Circuits do visit twice in the year your Realm, and execute Justice according to your Laws: and if we who are your publique Judges receive any diminution of such reverence and respect in our places, which our predecessors had, we shall not be able to do you such acceptable service as they did, without having such reverence and respect as Judges ought to have. The state of this Question is not in statu deliberativo, but in statu judiciali; it is not disputed de bono, but de vero, non de Lege fienda, sed de Lege lata; not to frame or devise new Laws, but to inform your Majesty what your Law of England is: and therefore it was never seen before, that when the Question is of the Law, that your Judges of the Law have been made disputants with him who is inferior to them, who day by day plead before them at their several Courts at Westminster: and although we are not afraid to dispute with Mr. Bennet and Mr. Bacon, yet this example being primæ impressionis, and your Majesty detesting Novelties and innovations, we leave it to your Grace and Princely consideration, whether your Majesty will permit our answering in hoc statu judiciali, upon your publique Judges of the Realm? But in Obedience to your Majesties command, We, with your Majesties gracious favor, in most humble manner will inform your Majesty touching the said Question, which we, and our predecessors before us, have oftentimes adjudged upon judicial proceedings in your Courts of Justice at Westminster: which Judgments cannot be reversed or examined for any Error in Law, if

not

not by a Writ of Erroꝛ in a moꝛe high and ſupꝛeam Court of Juſtice, upon legal and judicial pꝛoceedings: and that is the ancient Law of England, as appeaꝛeth by the Statute of 4 H. 4. cap. 22.

And we being commanded to pꝛoceed, all that which was ſaid by us, the Judges, was to this effect, That the Tꝛyall De Modo Decimandi ought to be by the Common Law by a Jury of twelve men, it appeaꝛeth in thꝛee manners: Fiꝛſt, by the Common Law: Secondly, by Acts of Paꝛliament: And laſtly, by infinite judgments and judicial pꝛoceedings long times paſt without any impeachment oꝛ interꝛuption.

But fiꝛſt it is to ſee, What is a Modus Decimandi? Modus Decimandi is, when Lands, Tenements, oꝛ Heꝛeditaments have been given to the Paꝛſon and his ſucceſſoꝛs, oꝛ an annual certain ſum, oꝛ otheꝛ pꝛofit, always, time out of minde, to the Paꝛſon and his ſucceſſoꝛs, in full ſatisfaction and diſcharge of all the Tythes in kinde in ſuch a place; and ſuch manner of Tything is now confeſſed by the otheꝛ paꝛty to be a good baꝛ of Tythes in kinde.

I. That Modus Decimandi ſhall be tꝛyed by the Common Law, that is, that all ſatisfactions given in diſcharge of Tythes, ſhall be tꝛyed by the Common Law: and theꝛefoꝛe put that which is the moſt common caſe, That the Loꝛd of the Mannoꝛ of Dale pꝛeſcribes to give to the Paꝛſon 40 s. yeaꝛly, in full ſatisfaction and diſcharge of all Tythes gꝛowing and renewing within the Mannoꝛ of Dale, at the Feaſt of Eaſter: The Paꝛſon ſueth the Loꝛd of the Mannoꝛ of Dale foꝛ his Tythes of his Mannoꝛ in kind, and he in Baꝛ pꝛeſcribes in manneꝛ ut ſupra: The Queſtion is, if the Loꝛd of the Mannoꝛ of Dale may upon that have a Pꝛohibition, foꝛ if the Pꝛohibition lyeth, then the Spiritual Court ought not to tꝛy it; foꝛ the end of the Pꝛohibition is, That they do not tꝛy that which belongs to the Tꝛyal of the Common Law; the woꝛds of the Pꝛohibition being, that they would dꝛaw the ſame ad aliud examen.

Fiꝛſt, the Law of England is divided into Common-Law, Statute-Law, and Cuſtoms of England: and theꝛefoꝛe the Cuſtoms of England are to be tꝛyed by the Tꝛyal which the Law of England doth appoint.

Secondly, Pꝛeſcriptions by the Law of the Holy Church, and by the Common Law, diffeꝛ in the times of limitation; and theꝛefoꝛe Pꝛeſcriptions and Cuſtoms of England ſhall be tꝛyed by the Common Law. See 20 H. 6. fo. 17. 19 E. 3. Juriſdiction 28. The Biſhop of Wincheſter bꝛought a Writ of Annuity againſt the Aꝛchdeacon of Suꝛry, and declaꝛed, how that he and his ſucceſſoꝛs were ſeiſed by the hands of the Defendant by title of Pꝛeſcription, and the Defendant demanded Judgment, if the Court would hold Juriſdiction being between ſpiritual peꝛſons, &c. Stone Juſtice, Be aſſuꝛed, that upon title of pꝛeſcription we will heꝛe hold Juriſdiction; and upon that, Wilby chief Juſtice gave the Rule, Anſweꝛ: Upon which it follows, that if a Modus Decimandi, which is an annual ſum foꝛ Tythes by pꝛeſcription, comes in debate between ſpiritual peꝛſons, that the ſame ſhall be tꝛyed heꝛe: Foꝛ the Rule of the Book is general, (ſcil.) upon title of pꝛeſcription, we will hold Juriſdiction, and that is foꝛtified with an Aſſeveration, Know aſſuꝛedly; as if he ſhould ſay, that it is ſo certain, that it is without queſtion. 32 E. 3. Juriſd. 26. Theꝛe was a Vicaꝛ who had onely Tythes and Obla̅tions, and an Abbot claimed an Annuity oꝛ Penſion of him by pꝛeſcription: and it was adjudged, that the ſame

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preſcription, although it was betwixt ſpiritual perſons, ſhould by tryed by the Common Law: Vide 22 H. 6. 46. and 47. A preſcription, that an Abby time out of minde had found a Chaplain in his Chappel to ſay Divine ſervice, and to miniſter Sacraments, tryed at the Common Law.

3. See the Record of 25 H. 3. cited in the caſe of Modus Decimandi before: and ſee Regiſter fo. 38. when Lands are given in ſatisfaction and diſcharge of Tythes.

4. See the Statute of Circumſpecte agatis, Decimæ debitæ, ſeu conſuetæ, which proves that Tythes in kind, and a Modus by cuſtom, &c.

5. 8 E. 4. 14. and Fitz. N. B. 41. g. A Prohibition lieth for Lands given in diſcharge of Tythes. 28 E. 3. 97. a. There Suit was for Tythes, and a Prohibition lieth, and ſo abridged by the Book, which of neceſſity ought to be upon matter De Modo Decimandi, or diſcharge.

6. 7 E. 6. 79. If Tythes are ſold for mony, by the ſale the things ſpiritual are made temporal, and ſo in the caſe De modo Decimandi, 42 E. 3. 12. agrees.

7. 22 E. 3. 2. Becauſe an Appropriation is mixt with the Temporalty, (ſcil.) the Kings Letters Patents, the ſame ought to be ſhewed how, &c. otherwiſe of that which is meer Temporal: and ſo it is of real compoſition, in which the Patron ought to joyn: Vide 11 H. 4. 85. Compoſition by writing, that the one ſhall have the Tythes, and the other ſhall have mony, the Suit ſhall be at the Common Law.

Secondly, By Acts of Parliament.

1. The ſaid Act of Circumſpecte agatis, which giveth power to the Eccleſiaſtical Judg to ſue for Tythes due firſt in kinde, or by cuſtom, i. e. Modus Decimandi: ſo as by authority of that Act, although that the yearly ſum coundeth in the Temporalty, which was payd by Cuſtom in diſcharge of Tythes, yet becauſe the ſame cometh in the place of Tythes, and by conſtitution, the Tythes are changed into mony, and the Parſon hath not any remedy for the ſame, which is the Modus Decimandi at the Common Law; for that cauſe the Act is clear, that the ſame was a doubt at the Common Law: And the Statute of Articuli Cleri, cap. 1. If corporal penance be changed in pœnam pecuniariam, for that pain Suit lieth in the Spiritual Court: For ſee Mich. 8 H. 3. Rot. 6. in Theſaur. A Prohibition lieth pro eo quod Rector de Cheſterton exigit de Hugone de Logis de certa portione pro Decimis Molendinarum; ſo as it appeareth, it was a doubt before the ſaid Statute, if Suit lay in the Spiritual Court de Modo Decimandi. And by the Statute of 27 H. 8. cap. 20. it is provided and enacted, That every of the ſubiects of this Realm, according to the Eccleſiaſtical Laws of the Church, and after the laudable uſages and cuſtoms of the Pariſh, &c. ſhall yield and pay his Tythes, Offerings, and other duties: and that for ſubſtraction of any of the ſaid Tythes, offerings, or other duties, the Parſon, &c. may by due Proceſs of the Kings Eccleſiaſticall Laws, convent the perſon offending before a competent Judg, having authority to hear and determine the Right of Tythes, and alſo to compel him to yield the Duties, i. e. as well Modus Decimandi, by laudable uſage or Cuſtom of the Pariſh, as Tythes in kind: and with that in effect agrees the Statute of 32 H. 8. cap. 7. By the Statute of 2 E. 3. cap. 13. it is enacted, That every of the Kings Subiects ſhall from hence forth, truly and juſtly, without fraud or guile, divide, &c. and pay all manner of their predial Tythes in their proper kind, as they riſe

and happen in ſuch manner and form as they have been of Right yielded and payd within forty years next before the making of this Act, or of Right and Cuſtom ought to have been payd. And after in the ſame Act there is this clauſe and Proviſo, Provided always, and be it enacted, That no perſon ſhall be ſued, or otherwiſe compelled to yield, give, or pay any manner of Tythes for any Mannors, Lands, Tenements, or Hereditaments, which by the Laws and Statutes of this Realm, or by any priviledg or preſcription, are not chargeable with the payment of any ſuch Tythes, or that be diſcharged by any compoſitions real. And afterwards, there is another Branch in the ſaid Act; And be it further enacted, That if any perſon do ſubſtract or withdraw any manner of Tythes, Obventions, Profits, Commodities, or other Duties before mentioned (which extends to Cuſtom of Tything, i. e. Modus Decimandi, mentioned before in the Act, &c.) that then the party ſo ſubſtracting, &c. may be convented and ſued in the Kings Eccleſiaſtical Court, &c. And upon the ſaid Branch, which is in the Negative, That no perſon ſhall be ſued for any Tythes of any Lands which are not chargeable with the payment of ſuch Tythes by any Law, Statute, Priviledg, Preſcription, or Real Compoſition. And always when an Act of Parliament commands or prohibits any Court, be it Temporal or Spiritual to do any thing temporal or ſpiritual, if the Statute be not obeyed, a Prohibition lieth: as upon the Statute de articulis ſuper Cartas, ca. 4. Quod communia Placita non tenentur in Scaccario: a Prohibition lieth to the Court of Exchequer, if the Barons hold a Common-Plea there, as appeareth in the Regiſter 187. b. So upon the Statute of Weſt. 2. Quod inquiſitiones quæ magnæ ſunt examinationis non capiantur in patria; a Prohibition lieth to the Juſtices of Niſi Prius. So upon the Statute of Articuli ſuper Cartas, cap. 7. Quod Conſtabularius Caſtr. Dover, non teneat Placitum forinſecum quod non tangit Cuſtodiam Caſtri, Regiſter 185. So upon the ſame Statute, cap. 3. Quod Seneſcallus & Mariſcallus non teneant Placita de libero tenemento, de debito, conventione, &c. a Prohibition lieth, 185. And yet by none of theſe Statutes, is any Prohibition or ſuperſedeas given by expreſs words of the Statute. So upon the Statutes 13 R. 2. cap. 3. 15 R. 2. cap. 2. 2 H. 4. cap. 11. by which it is provided, That Admirals do not meddle with any thing done within the Realm, but onely with things done upon the Seas, &c. a Prohibition lieth to the Court of Admiralty. So upon the Statute of Weſt. 2. cap. 43. againſt Hoſpitalers and Templers, if they do againſt the ſame Statute, Regiſt. 39. a. So upon the Statute de prohibitione regia, Ne laici ad citationem Epiſcopi conveniant ad recognitionem faciend. vel Sacrament. præſtanda niſi in caſibus matrimonialibus & Teſtamentariis, a Prohibition lieth. Regiſt. 36. b. And ſo upon the Statute of 2 H. 5. cap. 3. at what time the Libel is grantable by the Law, that it be granted and delivered to the party without difficulty, if the Eccleſiaſtical Judg, when the cauſe which depends before him is mer Eccleſiaſtial, denieth the Libel, a Prohibition lieth, becauſe that he doth againſt the Statute; and yet no Prohibition by any expreſs words is given by the Statute. And upon the ſame Statute the Caſe was in 4 E. 4. 37. Pierce Peckam took Letters of Adminiſtration of the Goods of Roſe Brown of the Biſhop of London, and afterwards T. T. ſued to Thomas Archbiſhop of Canterbury, That becauſe the ſaid Roſe Brown had Goods within his Dioceſs, he prayed Letters of Adminiſtration to be committed to him, upon which the Biſhop granted him Letters of Adminiſtration, and afterwards

See Lib. Entr. 450. a Prohibition was upon the Statute that one ſhall not maintain; and ſo upon every penal Law.

See F.N.B. 39. b. Prohibition to the Common Pleas upon the Stat. of Magna Charta that they do not proceed in a Writ of Præcipe in Capite, where the Land is not holden of the King. 1 & 2 Eliz. Dy. 170, 171. Prohibition upon the Statute of barrenes, and pertit is onely prohibited by implication.

wards T. T. libelled in the Spiritual Court of the Archbishop in the Arches against Pierce Peckham, to whom the Bishop of London had committed Letters of Administration to repeal the same: and Pierce Peckham, according to the said Statute, prayed a Copy of the Libel exhibited against him, and could not have it, and thereupon he sued a Prohibition, and upon that an Attachment: And there Catesby Serjeant moved the Court, that a Prohibition did not lie, for two causes: 1. That the Statute gives that the Libel shall be delivered, but doth not say that the Plea in the Spiritual Court shall surcease by Prohibition. 2. The Statute is not intended of matter mere spiritual, as that case is, to try the Prerogative and the Liberty of the Archbishop of Canterbury and the Bishop of London, in committing of Administrations. And there Danby Chief Justice, If you will not deliver the Libel according to the Statute, you do wrong, which wrong is a temporal matter, and punishable at the Common Law; and therefore in this case the Party shall have a special Prohibition out of this Court, reciting the matter, and the Statute aforesaid, commanding them to surcease, untill he had the Copy of the Libel delivered unto him: which case is a stronger case than the case at the Bar, for that Statute is in the Affirmative, and the said Act of 2 E. 6. cap. 13. is in the Negative, scil. That no Suit shall be for any Tythes of any Land in kinde where there is Modus Decimandi, for that is the effect of the said Act, as to that point. And always after the said Act, in every Term in the whole Reigns of King E. 6. Queen Mary, and Queen Elizabeth, until this day, Prohibitions have been granted in Causa Modi Decimandi, and Judgments given upon many of them, and all the same without question made to the contrary. And accordingly all the Judges resolved in 7 E. 6. Dyer 79. Et contemporanea expositio est optima & fortissima in lege, & à communi observantia non est recedendum, & minime mutanda sunt quæ certam habuerunt interpretationem.

And as to the first Objection, that the Plea of Modus Decimandi is but accessary to the Right of Tythes; it was resolved, that the same was of no force, for three causes.

1. In this case, admitting that there is Modus Decimandi, then by the Custom, and by the Act of 2 E. 6. and the other Acts, the Tythes in kinde are extinct and discharged; for one and the same Land cannot be subject to two manner of Tythes, but the Modus Decimandi is all the Tythe with which the Land is chargeable: As if a Horse or other thing valuable be given in satisfaction of the Duty, the Duty is extinct and gone: and it shall be intended, that the Modus Decimandi began at the first by real composition, by which the Lands were discharged of the Tythes, and a yearly sum in satisfaction of them assigned to the Parson, &c. So as in this case there is neither Principal nor Accessary, but an Identity of the same thing.

2. The Statute of 2 E. 6. being a Prohibition in it self, and that in the Negative, if the Ecclesiastical Judge doth against it, a Prohibition lyeth, as it appeareth clearly before.

3. Although that the Rule be general, yet it appeareth by the Register it self, that a Modus Decimandi is out of it; for there is a Prohibition in Causa Modi Decimandi, when Lands are given in satisfaction of the Tythes.

As to the second Objection, it was answered and resolved, That that was from, or out of the Question; for status Quæstionis non est

deliberativus sed judicialis, what was fit and convenient, but what the Law is: and yet it was said, It shall be more inconvenient to have an Ecclesiastical Judge, who is not sworn to do Justice, to give sentence in a case between a man of the Clergy and a Lay-man, than for twelve men sworn to give their Verdict upon hearing of Witnesses viva voce, before an indifferent Judge, who is sworn to do Right and Justice to both parties: But convenient or inconvenient is not the Question: Also they have in the Spiritual Court such infinite exceptions to Witnesses, that it is at the Will of the Judg with which party he shall give his sentence.

As to the third Objection, it was answered and resolved: First, That satisfactio pecuniaria of it self is Temporal: But for as much as the Parson hath not remedy pro Modo Decimandi at the Common Law, the Parson by force of the Acts cited before might sue pro Modo Decimandi in the Ecclesiastical Court: but that doth not prove, That if he sueth for Tythes in kinde, which are utterly extinct, and the Land discharged of them, that upon the Plea de Modo Decimandi, a Prohibition should not lie, for that without all question it appeareth by all that which before hath been said, that a Prohibition doth lie. See also 12 H. 7. 24. b. Where the original cause is the Spiritual, and they proceed upon a Temporal, a Prohibition lyeth. See 39 E. 3. 22 E. 4. Consultation. That Right of Tythes which is meerly Ecclesiastical, yet if the question ariseth of the limits of a Parish, a Prohibition lieth: and this case of the limits of a Parish was granted by the Lord Chancellor, and not denied by the other side.

As to the Objection, that an Averment is taken of the refusal of the Plea de Modo Decimandi; it was answered and resolved, That the same is of no force for divers causes:

1. It is onely to inforce the contempt.

2. If the Spiritual Court ought to have the Trial de Modo Decimandi, then the refusal of acceptance of such a Plea should give cause of Appeal, and not of Prohibition: as if an Excommunication, Divorce, Heresie, Simony, &c. be pleaded there, and the Plea refused, the same gives no cause of Prohibition: as, if they deny any Plea, meer Spiritual Appeal, and no Prohibition lieth.

3. From the beginning of the Law, no Issue was ever taken upon the refusal of the plea in Causa Modi Decimandi, nor any Consultation ever granted to them, because they did not refuse, but allowed the plea.

4. The refusal is no part of the matter issuable or material in the plea; for the same is no part of the suggestion which onely is the substance of the plea: and therefore the Modus Decimandi is proved by two Witnesses, according to the Statute of 2 E. 6. cap. 13. and not the refusal, which proveth, that the Modus Decimandi is onely the matter of the suggestion, and not the refusal.

5. All the said five matters of Discharge of Tythes mentioned in the said Branch of the Act of 2 E. 6. being contained within a suggestion, ought to be proved by two Witnesses, and so have been always from the time of the making of the said Act; and therefore the Statute of 2 E. 6. clearly intended, that Prohibitions should be granted in such causes.

6. Although that they would allow bona fide de Modo Decimandi, without refusal, yet if the Parson sueth there for Tythes in kinde, when the Modus is proved, the same being expressly prohibited by the

Act

Act of 2 E. 6. a Prohibition lieth, although the Modus be spiritual, as appeareth by the said Book of 4 E. 4. 37. and other the Cases aforesaid.

And afterwards, in the third day of debate of this case before his gracious Majesty, Dr. Bennet and Dr. Martin had reserved divers consultations granted in Causa Modi Decimandi, thinking that those would make a great impression in the Opinion of the King: and thereupon they said, That Consultations were the Judgments of Courts had upon deliberation, whereas Prohibitions were onely granted upon surmises: And they shewed four Precedents:

One, where three joynly sued a Prohibition in the Case of Modo Decimandi, and the Consultation saith, Pro eo quod suggestio materiaque in eadem contenta minus sufficiens in Lege existit, &c.

2. Another in Causa Modi Decimandi, to be paid to the Parson or Vicar.

3. Where the Parson sued for Tythes in kinde, and the Defendant alledged Modus Decimandi to be paid to the Vicar.

The fourth, where the Parson libelled for Tythe Wool, and the Defendant alledged a custom, to reap Corn, and to make it into sheaves, and to set forth the tenth sheaf at his charges, and likewise of Hay, to sever it from the nine cocks at his charge, in full satisfaction of the Tythes of the Corn, Hay, and Wool.

To which I answered, and humbly desired the Kings Majesty to observe that these have been reserved for the last, and center point of their proof: And by them your Majesty shall observe these things:

1. That the Kings Courts do them Justice, when with their consciences and oaths they can.

2. That all the said Cases are clear in the Judgment of those who are learned in the Laws, that Consultation ought by the Law to be granted.

For as unto the first precedent, the case upon their own shewing appeareth to be, Three persons joyned in one Prohibition for three several parcels of Land, each of which had a several manner of Tything; and for that cause they could not joyn, when their interests were several; and therefore a Consultation was granted.

As to the second precedent, The manner of Tything was alledged to be paid to the Parson or Vicar, which was altogether uncertain.

As to the third precedent, The Modus never came in debate, but whether the Tythes did belong to the Parson or Vicar? which being betwixt two spiritual persons, the Ecclesiastical Court shall have Jurisdiction: and therewith agreeth 38 E. 3. 6. cited before by Bacon: and also there the Prior was of the Order of the Cistertians; for if the Tythes originally belonged to the Parson, any recompence for them shall not bar the Parson.

As unto the last precedent, the same was upon the matter of a Custom of a Modus Decimandi for Wool: for to pay the Tythe of Corn or Hay in kinde, in satisfaction of Corn, Hay and Wool, cannot be a satisfaction for the Wool; for the other two were due of common right: And all this appeareth in the Consultations themselves, which they shew, but understand not. To which the Bishop of London said, that the words of the Consultation were, Quod suggestio prædicta materiaque in eadem contenta minus sufficiens in Lege existit, &c. so as materia cannot be referred to form, and therefore it ought to extend to the Modus Decimandi.

To

To which I answered, That when the matter is insufficiently or uncertainly alledged, the matter it self faileth; for matter ought to be alledged in a good sentence: and although the matter be in truth sufficient, yet if it were insufficiently alledged, the plea wanteth matter. And the Lord Treasurer said openly to them, that he admired that they would alledge such things which made more against them than any thing which had been said. And when the King relied upon the said Prohibition in the Register, when Land is given in discharge of Tythes, the Lord Chancellor said, that that was not like to this case; for there, by the gift of the Land in discharge of Tythes, the Tythes were actually discharged: but in the case de Modo Decimandi, an annual sum is payed for the Tythes, and the Land remains charged with the Tythes, but ought to be discharged by plea de Modo Decimandi: All which was utterly denied by me; for the Land was as absolutely discharged of the Tythes in casu de Modo Decimandi, when an annual sum ought to be paid, as where Land is given: For all the Records and precedents of Prohibition in such cases are, That such a sum had been alwaies, &c. paid in plenam contentationem, satisfactionem & exonerationem omnium & singularum Decimarum, &c. And although that the sum be not paid, yet the Parson cannot sue for Tythes in kind, but for the mony: for, as it hath been said before, the Custom and the said Acts of Parliament (where there is a lawful manner of Tything) hath discharged the Lands from Tythes in kinde, and prohibited, that no suit shall be for them. And although that now (as it hath been said) the Parsons, &c. may sue in the Spiritual Court pro Modo Decimandi, yet without question, at the first, the annual payment of mony was as Temporal, as annual profits of Lands were: All which the King heard with much patience. And the Lord Chancellor answered not to that which I had answered him in, &c.

And after that his most excellent Majesty, with all his Councel, had for three days together heard the allegations on both sides, He said, That he would maintain the Law of England, and that his Judges should have as great respect from all his Subjects as their predecessors had had: And for the matter, he said, that for any thing that had been said on the part of the Clergy, that he was not satisfied: and advised us his Judges to confer amongst our selves, and that nothing be encroached upon the Ecclesiastical Jurisdiction, and that they keep themselves within their lawful Jurisdiction, without unjust vexation and molestation done to his Subjects, and without delay or hindering of Justice. And this was the end of these three days consultations.

And note, That Dr. Bennet in his discourse inveighed much against the opinion in 8 E. 4. 14. and in my Reports in Wrights Case, That the Ecclesiastical Judg would not allow a Modus Decimandi; and said, That that was the mystery of iniquity, and that they would allow it. And the King asked, for what cause it was so said in the said Books? to which I answered, that it appeareth in Linwood, who was Dean of the Arches, and of profound knowledg in the Canon and Civil Law, and who wrote in the Reign of King Henry the sixth, a little before the said Case in 8 E. 4. in his title de Decimis, cap. Quoniam propter, &c. fol. 139. b. Quod Decimæ solvantur, &c. absque ulla diminutione: and in the glosse it is said, Quod Consuetudo de non Decimando, aut de non bene Decimando non valet. And that being written by a great Canonist of England, was the cause of the said saying in 8 E. 4. that they would not allow the said plea de Modo Decimandi; for always the Modus Decimandi

Decimandi is leſs in value than the Tithes in ſpecie, and then the ſame is againſt their Canon; Quod decimæ ſolvantur abſque diminutione, & quod conſuetudo de non plene Decimando non valet. And it ſeemed to the King, that that Book was a good Cauſe for them in the time of King Edward the fourth to ſay, as they had ſaid; but I ſaid, That I did not relie upon that, but upon the grounds aforeſaid, (ſcil.) The common Law, Statute-Laws, and the continual and infinite judgements and judiciall proceedings, and that if any Canon or Conſtitution be againſt the ſame, ſuch Canon and Conſtitution, &c. is void by the Statute of 25 H. 8. Cap. 19. which ſee and note: For all Canons, Conſtitutions, &c. againſt the Prerogative of the King, the common Laws, Statutes, or Cuſtoms of the Realm are void.

Laſtly, the King ſaid; That the high Commiſſion ought not to meddle with any thing but that which is enormous and exorbitant, and cannot permit the ordinary Proceſs of the Eccleſiaſtical Law; and which the ſame Law cannot punish. And that was the cauſe of the inſtitution of the ſame Commiſſion, and therefore, although every offence, ex vi termini, is enormous, yet in the Statute it is to be intended of ſuch an offence, as is extra omnem normam, as Hereſie, Schiſme, Inceſt, and the like great offences: For the King ſaid, That it was not reaſon that the high Commiſſion ſhould have conuſance of common offences, but to leave them to Ordinaries, ſcil. becauſe that the party cannot have any appeal in caſe the high Commiſſon ſhall determine of it. And the King thought that two high Commiſſions, for either Province one, ſhould be ſufficient for all England, and no more.

XV. Mich. 39 and 40 Eliz. in the Kings Bench.

Bedell and Shermans Caſe.

MIch 39 and 40 Eliz. which is entred Mich. 40 Eliz. in the common Pleas, Rot. 699. Cantabr. the Caſe was this: Robert Bedel, Gent. and Sarah his wife, Farmors of the Rectory of Litlington in the County of Cambridge, brought an Action of Debt againſt John Sherman, in the cuſtody of the Marſhall of the Marſhalſey, and demanded 550 l. And declared, that the Maſter and Fellows of Clare-Hall in Cambridge, were ſeiſed of the ſaid Rectory in fee, in right of the ſaid Colledge, and in June 10. 29 Eliz. by Indenture demiſed to Chriſtopher Pheſant the ſaid Rectorie, for 21 years, rendring 17 l. 15 s. 5 d. and reſerving Rent-corn according to the Statute, &c. which Rent was the ancient Rent, who entred into the ſaid Rectory, and was poſſeſſed, and aſſigned all his intereſt thereof to one Matthew Batt, who made his laſt Will and Teſtament, and made Sarah his wife his Executrix, and died; Sarah proved the Will, and entred, and was thereof poſſeſſed as Executrix, and took to husband the ſaid Robert Bedel, by force whereof, they in the right of the ſaid Sarah, entred, and were poſſeſſed thereof; and that the Defendant was then Tenant, and ſeiſed for his life of 300 acres of arable Lands in Litlington aforeſaid, which ought to pay Tithes to the Rector of Litlington, and in anno 38 Eliz. the Defendant, grano ſeminavit 200 acres parcel, &c. And that the Tithes of the ſame, did amount to 150 l. and that the Defendant did not divide nor ſet forth the ſame from the 9 parts, but took and carried them away, againſt the form and effect

of

of the Statute of 2 E. 6, &c. And the Defendant pleaded Nihil debet, and the Jury found that the Defendant did owe 55 l. and to the residue they found Nihil debet, &c. and in arrest of Judgment, divers matters were moved.

1. That grano seminata is too generall and incertain, but it ought to be expressed with what kind of corn the same was sowed.

2. It was moved, If the Parson ought to have the treble value, the forfeiture being by expresse words limited to none by the Act, or that the same did belong to the Queen.

3. If the same did belong to the Parson, if he ought to sue for the same in the Ecclesiastical Court, or in the Kings Temporall Court.

4. If the husband and wife should joyn in the Action, or the husband alone should have the Action, and upon solemn argument at the Barre, and at the Bench, the Judgment was affirmed.

XVI. Trinity Term. 7 Jacob. in the Court of Wards.

John Bailies Case.

IT was found by Writ of Diem clausit extremum, That the said John Bailie was seised of a Messuage or Tenement, and of, and in the fourth part of one acre of land, late parcel of the Demesne lands of the Mannor of Newton, in the County of Hereford, in his Demesne as of fee, and found the other points of the Writ; and it was holden by the two chief Justices, and the chief Barons:

1. That Messuagium, vel Tenemetum, is uncertain; for Tenementum is nomen collectivum, and may contain land, or any thing which is holden.

2. It was holden, that it was void for the whole, because that no Town is mentioned in the Office where the Messuage or Tenement, or the fourth part of the acre lieth, and from the Mesne of the Mannor upon a Traverse none can come, because it is not affirmed by the Office, that they are parcel of the Mannor, but Nuper parcel of the Mannor, which implieth, that now they are not, and it was holden by them, that no Melius inquirendum shall issue forth, because that the whole Office is incertain and void.

XVII. Trinity. 7 Jacobi Regis in the Court of Wards.

THe Attorney of the Court of Wards, moved the two chief Justices and chief Baron in this Case, That a man seised of lands in fee-simple, covenants for the advancement of his son, and of his name, and blood, and posterity, that he will stand seised of them, to the use of himself for the term of his life, and after to the use of his eldest son, and to such a woman which he shall marry, and to the heirs males of the body of the son, and afterwards the father dieth, and after the son taketh a wife and dieth; if the wife shall take an Estate for life, and the doubt was, because the wife of the son was not within the Considerations, and the use was limited to one who was capable (scil.) the son, and to another who was not capable, and therefore the son should take an estate in tail executed. But it was resolved by the said two chief Justices and chief Baron,

Baron, That the Wife should take well enough: and as to the first Reason, they resolved, That the Wife was within the consideration, for the consideration was for the advancement of his posterity; and without a Wife, the Son cannot have posterity: also when the Wife of the Son is sure of a Joynture, the same is for the advancement of the Son, for thereby he shall have the better marriage. And as to the second, it was resolved, that the estate of the Son shall support the use to the Defendant: and when the contingent happeneth, the Estate of the Son shall be changed according to the limitation, scil. to the Son and the woman, and the Heirs of the body of the Son: And so it was resolved in the Kings Bench by Popham chief Justice, and the whole Court of the Kings-Bench, in the Reign of Quæn Eliz. in Sheffields Case, for both points.

XVIII. Trinit. 7 Jacobi Regis: In the Court of Wards.

Sparies Case.

JOhn Spary, seised in fee in the right of his Wife of Lands holden of the Crown by Knights service, had issue by her, and 22. Decemb. anno 9 Eliz. alienes to Edward Lord Stafford; the Wife dyed, the issue of full age, the Lands continue in the hands of the Alienee, or his Assigns; and ten years after the death of the Father, and twelve years after the death of the Mother, Office is found, 7 Jacobi, finding all the special matter after the death of the Mother: the Question was, Whether the mean profits are to be answered to the King? And it was resolved by the said two chief Justices, and the chief Baron, that the King should not have the mean profits, because that the Alienee was in by title; and until Entry the Heir hath no remedy for the mean profits, but that the King might seise and make Livery, because that the Entry of the Heir is lawful by the Statute of 32 H. 8.

XIX. Trinit. 7 Jacobi Regis: In the Court of Wards.

IT was found by force of a Mandamus at Kendal in the County of Westmerland the 21 of December, 6 Jacobi Regis, That George Earl of Cumberland, long before his death, was seised in tayl to him and to the Heirs males of his body, of the Castles and Mannors of Browham, Appleby, &c. the Remainder to Sir Ingram Clifford, with divers Remainders over in tayl; the Remainder to the right Heirs of Henry Earl of Cumberland, Father of the said George: and that the said George, Earl, so seised by Fine and Recovery, conveyed them to the use of himself and Margaret his Wife for their lives, for the Joynture of the said Margaret; and afterwards to the Heirs males of the body of George Earl of Cumberland, and for want of such issue, to the use of Francis, now Earl of Cumberland, and to the Heirs males of his body begotten; and for want of such issue, to the use of the right Heirs of the said George: and afterwards, by another Indenture, conveyed the Fee-simple to Francis, Earl: By force of which, and of

the Statute of Uses, they were seised accordingly: and afterwards, 30 Octob. anno 3 Jacobi, the said George Earl of Cumberland dyed without heir male of his body lawfully begotten: and further found, that Margaret, Countess of Cumberland that now is, was alive, and took the profits of the premisses from the death of the said George Earl of Cumberland until the taking of that inquisition; and further found the other points of the Writ.

And first it was objected, that here was no dying seised found by Office, and therefore the Office shall be insufficient: But as to that, it was answered and resolved, That by this Office the King was not entitled by the common Law, for then a dying seised, or at first a dying the day of his death was necessary: But this Office is to be maintained upon the Statute of 32 and 34 H. 8. by force of which no dying seised is requisite, but rather the contrary, (scil.) If the Land be (as this case is) conveighed to the Wife, &c. And so it was resolved in Vincents case, anno 23 Eliz. where all the Land holden in Capite was conveighed to the younger Son, and yet the eldest Son was in Ward, notwithstanding that nothing descended.

The second Objection was, It doth not appear that the Estate of the Wife continued in her untill the death of the Earl, for the Husband and Wife had aliened the same to another; and then no primer seisin shall be, as it is agreed in Binghams case.

As to that, it was answered and resolved, That the Office was sufficient prima facie for the King, because it is a thing collateral, and no point of the Writ; and if any such alienation be (which shall not be intended) then the same shall come in of the other part of the Alienee by a Monstrans de droit; and the case at Bar is a stronger case, because it is found, that the said Countess took the profits of the premisses from the death of George the Earl, until the finding of the Office.

XX. Trinity Term, 7 Jacobi: In the Court of Wards.

Wills Case.

HEnry Wills, being seised of the fourth part of the Mannor of Wryland in the County of Devon, holden of Queen Elizabeth in Socage-tenure in capite, of the said fourth part enfeoffed Zachary Irish and others, and their Heirs, to the use of the said Henry for the term of his life, and afterwards to the use of Thomas Wills his second son in tayl, and afterwards to the use of Richard Wills his youngest son in tayl; and for default of such issue, to the use of the right Heirs of the said Henry: and afterwards the said Henry so seised as aboveraid died, thereof seised, William Wills being his Son and Heir of full age; Thomas the second Son entred as into his Remainder: All this matter is found by Office, and the question was, if the King ought to have primer seisin in this case, and that Livery or Ouster le main shall be sued in this case by the Statutes of 32 and 34 H. 8. And it was resolved by the two chief Justices and the chief Baron, that not: if in this case by the common Law no Livery or Ouster le main shall be sued: and that was agreed by them all by the experience and course of the Court. See 21 Eliz. Dyer 362. If Tenant in Socage dyeth seised

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in possession his Heir within the age of fourteen years, he shall not sue Livery, but shall have an Ouster le main, una cum exitibus; but otherwise it is, if the Heir be of the age of fourteen years, which is his full age for Socage: and therewith agreeth 4 Eliz. Dyer 213.

And two precedents were shewed, which were decreed in the same Court by the advice of the Justices Assistants to the Court.

One in Trinity Term, 16 Eliz. Thomas Stavely the Father enfeoffed William Strelly and Thomas Law of the Mannor of Ryndly in the County of Nottingham, upon condition that they re-enfeoff the Feoffor and his Wife for their lives, the remainder to Thomas Stavely son and heir apparant of the Feoffor in Fee, which Mannor was holden of Queen Elizabeth in Socage in capite: and upon consideration of the saving in the Statute of 32 H. 8. next after the clause concerning Tenure in Socage in chief, it was resolved, That no Livery or Ouster le main should be sued in such case, and the reason was, because that the precedent clause giveth liberty to him who holdeth in Socage in chief, to make disposition of it, either by act executed, or by Will at his free will and pleasure: and before the said act, no Livery or Ouster le main should be sued in such case: and the words of the Saving are, Saving, &c. to the King, &c. all his Right, &c. of primer seisin and relief, &c. for Tenure in Socage, or of the nature of Tenure in Socage in chief, as heretofore hath been used and accustomed: But there was no use or custom before the Act, that the King should have any primer seisin, or relief in such case: and the words subsequent in the said Saving depend upon the former words, and do not give any primer seisin or relief where none was before.

Another precedent was in Pasc. 37 Eliz. in the Book of Orders, fol. 444. where the case was, that William Allet was seised of certain Lands in Pitsey called Lundsey, holden of the Queen in Socage in chief, and by Deed covenanted to stand seised to the use of his Wife for life, and afterwards to the use of Richard his younger son in Fee, and dyed, his Heir of full age; and all that was found by Office, and it was resolved, ut supra, That no Livery or Ouster le main should be sued in that case: but the doubt in the case at Bar was, because that Henry the Feoffor had a Reversion in Fee, which descended to the said William his eldest son.

XXI. Trinity Term, anno 7 Jacobi Regis. The Case of the Admiralty.

A Bill was preferred in the Star-Chamber against Sir Richard Hawkins Vice-Admiral of the County of Devon: and was charged, that one William Hull and others were notorious Pirats upon the High Seas, and shewed in certain, what Piracy they had committed: the said Sir Richard Hawkins knowing the same, did them receive, abett and comfort within the body of the County, and for bribes and rewards suffered them to be discharged. And what offence that was, the Court referred to the consideration of the two chief Justices and the chief Baron, who heard Councel of both sides divers days at Serjeants Inn.

And first, it was by them resolved, that by the Common Law the Admirals ought not to meddle with any thing done within the Realm, but onely with things done upon the Sea; and that appeareth fully by

the Statute of 13 R. 2. cap. 5. by which it appeareth, that ſuch was the Common Law in the time of King Edw. the third, and therewith agreeth the Statute of 2 H. 4. cap. 11. and the Statute of 15 H. 2. cap. 3. That becauſe the Admirals and their Deputies encroach to themſelves divers Juriſdictions and Franchiſes more than they ought to have, Be it enacted, that all Contracts, Pleas and Complaints, and all other things ariſing within the bodies of the Counties as well by Land as by Water, as alſo of Wreck of the Sea, the Admiral Court ſhall not have any conuſance, power, or juriſdiction, &c. Nevertheleſs of the death of a man, and of Mayheme done in great Ships, being in the main ſtream of great Rivers, onely below the Bridges nigh to the Sea, and not in other places of the ſame Rivers; and to arreſt Ships in the great Flotes for the great Voyage of the King and of his Realm: and by the Statute of 2 H. 5. cap. 6. the Admirals of the King of England have done and uſed reaſonably, according to the ancient Law and Cuſtom, upon the main Sea. See the Statute of 5 Eliz. cap. 5. And all this appeareth to be by the Common Law: and with that agreeth Stamford fol. 51. And if a man be killed or ſlain within the Arms of the Sea, where a man may ſee from the one part of the Land to the other, the Coroner ſhall inquire of it, and not the Admiral, becauſe that the Countrey may well know it: and he voucheth 8 E. 2. Coron. 399. So ſaith Stamford, the ſame proves that by the common Law before the Statute of 2 H. 4. cap. 11. the Admiral ſhall not have Juriſdiction unleſs upon the High Sea. See Pla. Com. 37. 6. If the Marſhal holdeth Plea out of the Verge, or the Admiral within the body of the County, the ſame is void. See 2 R. 3. 12. 30 H. 6. 6. by Priſoit.

2. It was reſolved, that the ſaid Statutes are to be intended of a power to hold Plea, and not of a power to award execution, (ſcil.) de juriſdictione tenendi placiti; non de juriſdictione exequendi: For notwithſtanding the ſaid Statutes, the Judge of the Admiralty may do execution within the body of the County: and therefore in 19 H. 6. 7. the caſe was, W. T. at Southwark affirmed a Plaint of Treſpaſſe in the Court of Admiralty before the Steward of the Earl of Huntington againſt J. B. of a Treſpaſſe done upon the High Sea, upon which iſſued a Citation to cite the ſaid J. B. to appear before the Steward aforeſaid at the common day then next enſuing, directed to P. who ſerved the ſaid Citation: at which day the ſaid J. B. made default: and the uſage of the Court is, that if the Defendant maketh default, he ſhall be amerced by the diſcretion of the Steward, to the uſe of the Plaintiff: The which J. B. for his default aforeſaid, was amerced to twenty marks; whereupon command was made to the ſaid P. as Miniſter of the Court aforeſaid, to take the goods of the ſaid J. B. to make agreement with the beforeſaid W. T. by force of which he for the ſaid twenty marks took five Cows, and an hundred ſheep, in execution for the mony aforeſaid, in the County of Leiceſter. And there it is holden by Newton, and the whole Court, that the Statutes reſtrain the power of the Court of Admiralty to hold Plea of a thing done within the body of the County, but they do not reſtrain the Execution of the ſame Court to be ſerved upon the Land: for it may be that the party hath not any thing upon the Sea, and then it is reaſon to have it upon the Land: and if ſuch a Defendant have nothing wherewithall to make agreement, they of the Court have power to take the body of ſuch a Defendant upon the Land in execution.

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In which case these points were observed:

1. Although that the Court of Admiralty is not a Court of Record, because they proceed there according to the Civil Law, (see Brook, Error 77. acc.) yet by custom of the Court they may amerce the Defendant for his default by their discretion.

2. That they may make execution for the same of the goods of the Defendant in corpore Comitatus: and if he hath not goods, then they may arrest the body of the Defendant within the body of the County.

But the great Question between them was, If a man committeth Piracy upon the Sea, and one knowing thereof, receiveth and comforteth the Defendant within the body of the County; if the Admiral and other the Commissioners, by force of the Act of 28 H. 8. cap. 16. may proceed by Indictment and conviction against the Receiver and Abettor, in as much as the offence of the Accessary hath his beginning within the body of the County? See this point resolved 8 Eliz. Dyer per curiam, which is omitted out of the printed Book.

And it was resolved by them, that such a Receiver and Abettor by the Common Law could not be indicted or convicted, because that the common Law cannot take conusance of the original Offence, because that is done out of the Jurisdiction of the common Law: and by consequence, where the common Law cannot punish the principal, the same shall not punish any one as accessary to such a principal. And therefore Coke chief Justice reported to them a Case which was in Suffolk in anno 28 Eliz. where Butler and others upon the Sea, next to the Town of Laystaft in Suffolk, robbed divers of the Queens subjects, and spoyled them of their goods, which goods they brought into Norfolk; and there they were apprehended, and there brought before me, then a Justice of the Peace within the same County, whom I examined, and in the end they confessed a cruel and barbarous Piracy, and that those goods which then they had with them, were part of the goods which they had robbed from the Queens subjects upon the High Sea: and I was of opinion, that in that Case it could not be Felony punishable by the common Law, because that the original act, (scil.) the taking of them, was not any offence whereof the common Law taketh knowledg; and by consequence, the bringing of them into a County could not make the same Felony punishable by our Law: and it is not like, where one stealeth goods in one County, and bring them into another, there he may be indicted of Felony in any of the Counties, because that the original act was Felony, whereof the common Law taketh knowledge: and yet notwithstanding I committed them to the Gaol, until the coming of the Justices of Assises. And at the next Assises the Opinion of Wray chief Justice, and Periam Justices of Assise, was, That for as much as the common Law doth not take notice of the original Offence, the bringing of the goods stoln upon the Sea into a County, did not make the same punishable at the Common Law: and thereupon they were committed to Sir Robert Southwell, then Vice-Admiral of the said Counties: and this in effect agrees with Lacies case, which see in my Reports cited in Binghams case in the 2 Reports 93. and in Constables case, C. 5. Reports 107.

See the Piracy was Felony, the Book of 40 Assis. 25. by Schard. where a Master or Captain of a Ship, together with some Englishmen, robbed the Kings Subjects upon the High Seas; where he saith, that it was Felony in the Norman Captain, and Treason in the Englishmen his companions: and the reason of the said case was, because the Normans were not then under the Obedience and Allegeance of the King

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of England (for King John loſt Normandy) and for that cauſe Piracy was but Felony in the Norman, but in the Engliſh who were under the Obedience and Allegeance of the King of England, the ſame was adjudged Treaſon, which is to be underſtood of Petit Treaſon, which was High Treaſon before: and therefore in that caſe, the Pirates being apprehended, the Norman Captain was hanged, and the E[illegible]gliſh men were hanged and drawn, as appeareth by the ſame Book: ſee Stamford 10.

And ſome objected, and were of opinion, That Treaſons done out of the Realm might have been determined by the common Law; but truly the ſame could not be puniſhable, but onely by the Civil Law before the Admiral, or by Act of Parliament, as all Forreign Treaſons and Felonies were by the common Law: and therefore where it is declared by the Statute of 25 E. 3. That adherence to the Enemies of the King within England, or elſewhere, is Treaſon, the ſame ſhall be tryed by the common Law: but where it is done out of the Realm, the Offender ſhall not be attainted but by Parliament, untill the Statute of 35 H. 8. cap. 2. although that there are Opinions in ſome Books to the contrary: ſee 5 R. 2. Quare impedit, &c.

XXII. Trinit. 7 Jacobi Regis: In the Common-Pleas.

Pettus and Godſalves Caſe.

IF a Fine levyed Trinity Term, anno quinto of this King, between John Pettus Eſq; Plaintiff, and Roger Godſalve and others, Deforceants of the Mannor of Caſtre, with the appurtenances, &c. in the County of Norfolk, where in the third proclamation upon the Foot of the ſame Fine the ſaid proclamation is ſaid to have been made in the ſixth year of the King that now is, which ought to have been anno quinto of the King: and whereas upon the Foot of the ſame Fine, the fourth proclamation is altogether left out, becauſe upon the view of the proclamations upon Doriſis, upon Record, not finis ejuſdem Termini per Juſticiarios, remaining with the Chirographer, and the Book of the ſaid Chirography, in which the ſaid proclamations were firſt entered, it appeareth, that the ſaid proclamations were rightly and duly made, therefore it was adjudged, that the Errors or defects aforeſaid ſhould be amended, and made to agree as well with the proclamation upon Record of the ſaid Fine, and Entry of the ſaid Book, as with the other proclamations in Doriſis ſuper pedes aliorum finium of the ſame Term: and this was done upon the motion of Haughton Serjeant at Law.

XXIII. Mich. 7 Jacobi: In the Court of Wards.

Sammes Caſe.

JOhn Sammes being ſeiſed of Grany Mead by Copy of Court-Roll of the Mannor of Tolleſham the great, of which Sir Thomas Beckingham, &c. and held the ſame of the King by Knights ſervice in capite; Sir Thomas by his Deed indented, dated the 22 of December, in the

first

firſt year of King James, made between him of the one part, and the ſaid John Sammes and George Sammes Son and Heir apparant of the ſaid John of the other part, did bargain, ſell, grant, enfeoff, releaſe, and confirm unto the ſaid John Sammes the ſaid Mead called Grany Mead, to have and to hold the ſaid Mead unto the ſaid John Sammes and George Sammes, and their Heirs and Aſſignes, to the onely uſe and behoof of the ſaid John Sammes and George Sammes, their Heirs and Aſſigns for ever: and by the ſame Indenture Sir Thomas did Covenant with John and George, to make further aſſurance to John and George, and their Heirs, to the uſe of them and their Heirs, and Livery and Seiſin was made and delivered according to the true intent of the ſaid Indentures of the within mentioned premiſſes to the uſes within mentioned.

John Sammes the Father dyeth, George Sammes his Son and Heir being within age, the Queſtion was, Whether George Sammes ſhould be in Ward to the King or no? And in this caſe three points were reſolved:

1. For as much as George was not named in the premiſſes, he cannot take by the Habendum; and the Livery made according to the intent of the Indenture, doth not give any thing to George, becauſe the Indenture as to him is voyd: but although the Feoffment be good onely to John and his Heirs, yet the uſe limited to the uſe of John and George, and their Heirs, is good.

2. If the Eſtate had been conveyed to John and his Heirs by the Releaſe or Confirmation, as it well may be to a Tenant by Copy of Court Roll, the uſe limited to them is good: for upon a Releaſe which creates an Eſtate, a uſe may be limited, or a Rent reſerved without queſtion; but upon a Releaſe or Confirmation, which enures by way of Mitter le droit, an uſe cannot be limited, or a Rent reſerved.

But the third was of greater doubt, If in this caſe the Father and Son were Joynt-tenants, or Tenants in common? For it was objected, when the Father is onely enfeoffed to the onely uſe of him and his Son, and their Heirs in the Per, that in this caſe, they ſhall be Tenants in common. By the Feoffment the Father is in by the common Law in the Per, and then the limitation of the uſe to him and his Son, and to their Heirs, cannot devеſt the Eſtate, which was veſted in him by the common Law, out of him, and veſt the Eſtate in him in the Poſt by force of the Statute, according to the limitation of the uſe: and therefore, as to one moyety, the Father ſhall be in by force of the Feoffment in the Per, and the Son, as to the other moyety, ſhall be in by force of the Statute, according to the limitation of the uſe in the Poſt, and by conſequence they ſhall be Tenants in common. But it was anſwered and reſolved, That they were Joynt-tenants, and that the Son in the Caſe at Bar ſhould have the ſaid Grange by the Survivor: for if at the Common Law A. had been enfeoffed to the uſe of him and B. and their Heirs, although that he was onely ſeiſed of the Land, the uſe was joyntly to A. and B. For a uſe ſhall not be ſuſpended or extinct by a ſole ſeiſin, or joynt ſeiſin of the Land: and therefore if A. and B. be enfeoffed to the uſe of A. and his Heirs, and A. dyeth, the entire uſe ſhall deſcend to his Heir: as it appeareth in 13 H. 7. 6. in Stoners Caſe: and by the Statute of 27 H. 8. cap. 10. of Uſes, it appeareth, That when ſeveral perſons are ſeiſed to the uſe of any of them, that the Eſtate ſhall be executed according to the uſe.

And as to that which was ſaid, That the Eſtate of the Land which the Father hath in the Land, as to the moyety of the uſe which he himſelf

ſelf hath, ſhall not be deveſted out of him: So that it was anſwered and reſolved, That that ſhall well be: for if a man maketh a Feoffment in Fee to one, to the uſe of him and the Heirs of his body, in this caſe, for the benefit of the iſſue, the Statute according to the limitation of the uſes, deveſts the Eſtate veſted in him by the common Law, and executes the ſame in himſelf by force of the Statute; and yet the ſame is out of the words of the Statute of 27 H. 8. which are, Where any perſon, &c. ſtand or be ſeiſed, &c. to the uſe of any other perſon; and here he is ſeiſed to the uſe of himſelf: and the other clauſe is, Where divers and many perſons, &c. be joyntly ſeiſed, &c. to the uſe of any of them, &c. and in this caſe A. is ſole ſeiſed: But the Statute of 27 H. 8. hath been always beneficially expounded, to ſatisfy the intention of the parties, which is the direction of the uſe according to the Rule of the Law. So if a man, ſeiſed of Lands in Fee-ſimple, by Deed covenant with another, that he and his Heirs will ſtand ſeiſed of the ſame Land, to the uſe of himſelf and the Heirs of his body, or unto the uſe of himſelf for life, the remainder over in Fee; in that caſe, by the operation of the Statute, the Eſtate which he hath at the common Law is deveſted, and a new Eſtate veſted in himſelf, according to the limitation of the uſe. And it is to be known, that an uſe of Land (which is but a pernancy of the profits) is no new thing, but part of that which the owner of the Land had: and therefore, if Tenant in Borough-Engliſh, or a man ſeiſed of the part of his Mother, maketh a Feoffment to another without conſideration, the younger Son in the one caſe, and the Heir on the part of the Mother on the other, ſhall have the uſe, as they ſhould have the Land it ſelf, if no Feoffment had been made: as it is holden in 5 E. 4. 7. See 4 and 5 Phil. and Mar. Dyer 163. So if a man maketh a Feoffment unto the uſe of another in tayl, and afterwards to the uſe of his right Heirs, the Feoffor hath the Reverſion of the Land in him; for if the Donee dyeth without iſſue, the Law giveth the uſe, which was part of the Land, to him: and ſo it was reſolved, Trinity, 31 Eliz. between Fenwick and Milford in the Kings-Bench. So in 28 H. 8. Dyer 11. the Lord Roſſes Caſe: A man ſeiſed of one Acre by Priority, and of another Acre by Poſteriority, and make a Feoffment in Fee of both to his uſe: and it was adjudged, that although both paſſe at one inſtant, yet the Law ſhall make a Priority of the uſes, as if it were of the Land it ſelf: which proves, that the uſe is not any new thing, for then there ſhould be no Priority in the Caſe: See 13 H. 7. b. by Butler.

So in the Caſe at Bar, The uſe limited to the Feoffee and another, is not any new thing, but the pernancy of the old profits of the Land, which well may be limited to the Feoffee and another joyntly: But if the uſe had been onely limited to the Feoffee and his Heirs, there, becauſe there is not any limitation to another perſon, nec in præſenti, nec in futuro, he ſhall be in by force of the Feoffment.

And it was reſolved, That Joynt-tenants might be ſeiſed to an uſe, although that they come to it at ſeveral times: as, if a man maketh a Feoffment in Fee to the uſe of himſelf, and to ſuch a woman, which he ſhall after marry, for term of their lives, or in tayl, or in fee; in this caſe, if after he marrieth a Wife, ſhe ſhall take joyntly with him, although that they take the uſe at ſeveral times, for they derive the uſe out of the ſame fountain and Freehold, ſcil. the Feoffment: See 17 Eliz. Dyer 340. So if a Diſſeiſin be had to the uſe of two, and one of them agreeth at one time, and the other at another time, they ſhall be

be Joynt-tenants; but otherwiſe it is of Eſtates which paſs by the common Law: and therefore if a Grant be made by Deed to one man for term of life, the Remainder to the right Heirs of A. and B. in Fee, and A. hath iſſue and dyeth, and afterwards B. hath iſſue and dyeth, and then the Tenant for life dyeth; in that caſe the Heirs of A. and B. are not Joynt-tenants, nor ſhall joyn in a Scire facias to execute the Fine, 24 E. 3. Joynder in Action 10. becauſe that although the remainder be limited by one Fine, and by joynt words, yet becauſe that by the death of A. the Remainder as unto the moyety veſted in his Heir, and by the death of B. the other moyety veſted in his Heir at ſeveral times, they cannot be Joynt-tenants: But in the caſe of a uſe, the Husband taketh all the uſe in the mean time; and when he marryeth, the Wife takes it by force of the Feoffment and the limitation of the uſe joyntly with him, for there is not any fraction and ſeveral veſting by parcels, as in the other caſe, and ſuch is the difference. See 18 E. 3. 28. And upon the whole matter it was reſolved, That becauſe in the principal caſe the Father and Son were Joynt-tenants by the original purchaſe, that the Son having the Land by Survivor, ſhould not be in Ward: and accordingly it was ſo decreed.

XXIV. Paſc. 39 Eliz. Rot. 233. In the Kings-Bench.

Collins and Hardings Caſe.

THe Caſe between Collins and Harding was, A man ſeiſed of Lands in Fee, and alſo of Lands by Copy of Court Roll in Fee, according to the Cuſtome of the Mannor, made one entire Demiſe of the Lands in Fee, and of the Lands holden by Copy according to the Cuſtom, to Harding for years, rendering one entire Rent: and afterwards the Leſſor ſurrendred the Copyhold Land to the uſe of Collins and his Heirs: and at another time granted by Deed the Reverſion of the Freehold Lands to Collins in Fee, and Harding attorned; and afterwards for the Rent behind, Collins brought an Action of Debt for the whole Rent: And it was objected, That the reſervation of the Rent was an entire contract, and by the Act of the Leſſee the ſame cannot be apportioned: and therefore if one demiſeth three Acres, rendering 3 s. Rent, and afterwards bargaineth and ſelleth, by Deed indented and inrolled, the Reverſion of one Acre, the whole Rent is gone, becauſe that the Contract is entire and cannot be ſevered by the Act of the Leſſor: Alſo the Leſſee by that ſhall be ſubject to two Fealties, where he was ſubject but to one before.

As to theſe points, it was anſwered and reſolved, That the Contract was not entire, but that the ſame by the Act of the Leſſor, and the aſſent of the Leſſee, might be divided and ſevered: for the Rent is incident to the Reverſion, and the Reverſion is ſeverable, and by conſequence the Rent alſo: for acceſſarium ſequitur naturam ſui principalis, and that cannot be ſevered or divided by the aſſent of the Leſſee, or expreſs attornment, or implyed by force of an Act of Parliament, to which every one is a party, as by force of the Statute of Inrolments, or of Uſes, &c. And as to the two Fealties, to that the Leſſee ſhall be ſubject, although that the Rent ſhall be extinct: for Fealty is by neceſſity of Law incident to the Reverſion, and to every part of it; but the Rent ſhall be divided pro rata portionis: and ſo it was adjudged.

And it was also adjudged, That although Collins cometh to the Reversion by several Conveyances, and at several times, yet he might bring an action of Debt for the whole Rent. Hill. 43 Eliz. Rot. 243. West and Lassels Case: A man made a Lease for years of certain Lands, and afterwards deviseth the Reversion of two parts to one, he shall have two parts of the Rent; and he may have an Action of Debt for the same, and have Judgment to recover. Hill. 42 Eliz. Rot. 108. in the Common-Pleas, Ewer and Moyls Case: The Devisee of the Reversion of part shall avow for part of the Rent, and such Avowry shall be good and maintainable.

Note well these Cases and Judgments, for they are given upon great reason and consideration, for otherwise great inconvenience would ensue, if by severance of part of the Reversion, the entire Rent should be lost: and the opinion reported by Serjeant Benloes, in Hill. 6 and 7 E. 6. to the contrary, nihil valet, (scil.) That the Rent in such case shall be lost, because that no contract can be apportioned, which is not a Law: For, 1. A Rent reserved upon a Lease for years is more than a Contract, for it is a Rent-service. 2. It is incident to the Reversion which is severable. 3. Upon recovery of part in Waste, or upon entry in part for a forfeiture, or upon surrender of part, the Rent is apportionable.

25. Note; It was adjudged 19 Eliz. in the Kings-Bench, That where one obtained a Prohibition upon Prescription de Modo Decimandi, by payment of a certain sum of mony at a certain day; upon which issue was taken, and the Jury found the Modus Decimandi by payment of the said sum, but that it had been payd at another day: and the Case was well debated, and at the last it was resolved, That no Consultation should be granted; for although that the day of payment be mistaken, yet it appeareth to the Court, that no Tythes in kinde were due, for which the suit was in the Spiritual Court: and the Tryal of the Custom de Modo Decimandi belongeth to the Common Law, and a Consultation shall not be granted where the Spiritual Court hath not Jurisdiction of the Cause: Tanfield, chief Baron, hath the Report of this Case.

XXV. Mich. 7 Jacobi Regis.

IN an Ejectione Firmæ, the Writ and Declaration were of two parts of certain Lands in Hetherset and Windham in Norfolk, and doth not say in two parts, in three parts to be divided; and yet it was good as well in the Declaration as in the Writ: for without question the Writ is good, de duabus partibus, generally, and so is the Register. See 4 E. 3. 162. 2 E. 3. 31. 2 Assis. 1. 10 Assis. 12. 10 E. 3. 511. 11 Ass. 21. 11 E. 3. Bre. 478. 9 H. 6. 36. 17 E. 4. 46. 19 E. 3. Bre. 244. And upon all the said Books it appeareth, that by the intendment and construction of the Law, when any parts are demanded without shewing in how many parts the whole is divided, that there remains but one part not divided: As if two parts are demanded, there remains a third part; and when three parts are divided, there remains a fourth part, &c. But when any demand is of other parts in other form, there he ought to shew the same specialty: as if one demandeth three parts of five

five parts, or four parts of six, &c. And according to this difference it was so resolved in Jourdens Case in the Kings-bench: and accordingly Judgment was given in this Term in the Case at Bar.

XXVI. Mich. 7 Jacobi Regis: In the Common-Pleas.

Muttons Case.

AN Action upon the Case was brought against Mutton, for calling of the Plaintif, Sorcerer and Inchanter, who pleaded Not-guilty; and it was found against him to the damages of 6 d. And it was holden by the whole Court in the Common-Pleas, that no action lieth for the said words: for Sortilegium est rei futuri per sortes exploratio: Et Sortilegus sive Sortilegista est qui per sortes futura prænunciat. Inchauntry est verbis aut rebus adjunctis aliquid præter naturam moliri: whereof the Poet saith,

Carminibus Circes socios mutavit Ulyssis.

See 45 E. 3. 17. One was taken in Southwark with the Head and Visage of a Dead man, and with a Book of Sorcery in his Pail: and he was brought into the Kings-Bench before Knevet Justice, but no Indictment was framed against him: for which the Clarks made him swear, that he should never after commit any Sorcery; and he was sent to prison: and the Head and the Book were burned at Tuthil, at the charges of the Prisoner. And the ancient Law was, as it appeareth by Britton, that those who were attainted of Sorcery were burned: but the Law is not such at this day; but he who is convicted of such imposture and deceit shall be fined and imprisoned. And it was said, that it was adjudged, That if one calleth another Witch, that an Action will not lie, for it is too general: Et dicitur Latine Venefica: But if one saith, She is a Witch, and hath bewitched such a one to death, an Action upon the Case lieth, if in truth he be dead. Conjuration is derived of these words, Con and juro: Et proprie dicitur quando multi in alicujus perniciem jurant: And in the Statute of 5 Eliz. cap. 16. it is taken for Invocation of any evil and wicked Spirits, i. est conjurare verbis conceptis aliquos malos & iniquos spiritus; the same is made Felony: But Witchcraft, Inchantment, Charm, or Sorcery, is not felony, if by them any person be not killed or dyeth. So that Conjuration est verbis conceptis compellere malos & iniquos spiritus aliquod facere vel dicere, &c. But a Witch, who works any thing by any evil spirit, doth not make any Conjuration or Invocation by any powerfull names of the Devil, but the wicked spirit comes to her familiarly, and therefore is called a Familiar: But if a man be called a Conjurer, or a Witch, he shall not have any Action upon the Case, unless that he saith, That he is a Conjurer of the Devil, or of any evil or wicked spirit: or, that one is a Witch, and that he hath bewitched any one to death, as is before said.

And note, that the first Statute which was made against Conjuration, Witchcraft, Sorcery, and Inchantment, was the Act of 33 H. 8. cap. 8. and by it they were Felony in certain cases special, but that Act was repealed by the Statute of 1 E. 6. cap. 12.

XXVII. Mich. Term, 7 Jacobi Regis; In the Court of Wards.

Sir Allen Percies Caſe.

SIr John Fitz and Bridget his Wife, being Tenants for life of a Tenement called Ramſhams, the remainder to Sir John Fitz in tail, the remainder to Bridget in tail, the Reverſion to Sir John and his Heirs: Sir John, and Bridget his Wife, by Indenture demiſed the ſaid Tenement to William Sprey for divers years yet to come, except all Trees of Timber, Oaks and Aſhes, and liberty to carry them away, rendering Rent, and afterwards Sir John dyed, having iſſue Mary his daughter, now the Wife of Sir Allen Percy Knight: and afterwards the ſaid William Sprey demiſed the ſame Tenement to Sir Allen for ſeven years: The Queſtion was, Whether Sir Allen, having the immediate inheritance in the right of his Wife, expectant upon the Eſtate for the life of Bridget, and alſo having the poſſeſſion by the ſaid Demiſe, might cut down the Timber Trees, Oaks, and Aſhes: And it was objected, that he might well do it: for it was reſolved in Saunders Caſe, in the fifth part of my Reports, fo. 12. That if Leſſee for years, or for life, aſſigns over his term or Eſtate unto another, excepting the Mines, or the Trees, or the Clay, &c. that the exception is void, becauſe that he cannot except that which he cannot lawfully take, and which doth not belong unto him by the Law. But it was anſwered and reſolved by the two chief Juſtices, and the chief Baron, That in the Caſe at Bar, the Exception was good without queſtion, becauſe that he who hath the Inheritance, joyns in the Leaſe with the Leſſee for life. And it was further reſolved, That if Tenant for life Leaſeth for years, excepting the Timber Trees, the ſame is lawfully and wiſely done: for otherwiſe, if the Leſſee or Aſſignee cutteth down the Trees, the Tenant for life ſhould be puniſhed in Waſte, and ſhould not have any remedy againſt the Leſſee for years: and alſo if he demiſeth the Land without exception, he who hath the immediate Eſtate of Inheritance, by the aſſent of the Leſſee, may cut down all the Timber Trees, which when the term ended, all ſhould be waſted, and then the Tenant for life ſhould not have the Boots which the Law giveth him, nor the paſturage and other profits of the ſaid Trees, which he lawfully might take. But when Tenant for life upon his Leaſe excepteth the Trees, if they be cut down by the Leſſor, the Leſſee or Aſſignee ſhall have an Action of Treſpaſs, Quare vi & armis, and ſhall recover damages according to his loſs.

And this caſe is not like to the ſaid caſe of Saunders, which was affirmed to be good Law; for there the Leſſee aſſigned over his whole intereſt, and therefore could not except the Mines, Trees, and Clay, &c. which he had not but as things annexed to the Land: and therefore he could not have them when he had departed with his whole intereſt, nor he could not take them either for Reparations or otherwiſe: But when Tenant for life Leaſeth for years, except the Timber Trees, the ſame remaineth yet annexed to his Freehold, and he may command the Leſſee to take them for neceſſary Reparations of the Houſes. And in the ſaid caſe of Saunders, a Judgment is cited between Foſter and Miles

Plaintiffs,

Plaintiffs, and Spencer and Bourd Defendants, That where Leſſe for years aſſigns over his term, except the Trees, that Waſte in ſuch caſe ſhall be brought againſt the Aſſignee, but in this caſe without queſtion Waſte lieth againſt the Tenant for life, and ſo there is a difference, &c.

XXVIII. Mich. Term, 7 Jacobi Regis: In the Court of Wards.

Hulmes Caſe.

THe King (in the right of his Dutchy of Lancaſter) Lord: Richard Hulm (ſeiſed of the Mannor of Male in the County of Lancaſter, holden of the King as of his Dutchy by Knights ſervice) Peſne: and Robert Male (ſeiſed of Lands in Male, holden of the Peſn as of his ſaid Mannor by Knights ſervice) Tenant. Richard Hulm dyed; after whoſe death, 31 Hen. the eighth, it was, that he dyed ſeiſed of the ſaid Penalty, and that the ſame deſcended to Edward his Son and Heir within age, and found the Tenure aforeſaid, &c. And during the time that he was within age, Robert Male the Tenant dyed; after which, in anno 35 H. 8. it was found by Office, That Robert Male dyed ſeiſed of the ſaid Tenancy peravail, and that the ſame deſcended to Richard his Son and Heir within age, and that the ſaid Tenancy was holden of the King, as of his ſaid Dutchy, by Knights ſervice; whereas in truth the ſame was holden of Edward Hulm, then in Ward of the King, as of his Penalty: for which the King ſeiſed the Ward of the Heir of the Tenant. And afterwards, anno quarto Jacobi Regis that now is, after the death of Richard Male, who was lineal Heir of the ſaid Robert Male, by another Office it was found, That the ſaid Richard died ſeiſed of the ſaid Tenancy, and held the ſame of the King, as of his Dutchy, by Knights ſervice, his Heir within age: whereupon Richard Hulm, Coſin and Heir of the ſaid Richard Hulm, had preferred a Bill to be admitted to his Traverſe of the ſaid Office found in quarto Jacobi Regis: And the Queſtion was, Whether the Office found in 35 H. 8. be any eſtoppel to the ſaid Hulm, to Traverſe the ſaid laſt Office? or if that the ſaid Hulm ſhould be driven firſt to Traverſe the Office of 35 H. 8.

And it was objected, That he ought firſt to Traverſe the Office of 35 H. 8. as in the Caſe of 26 E. 3. 65. That if two Fines be levyed of Lands in ancient Demeſn, the Lord of whom the Land is holden ought to have a Writ of Deceit to reverſe the firſt Fine; and in that the ſecond Fine ſhall not be a Bar: And that the firſt Office ſhall ſtand as long as the ſame remains in force.

To which it was anſwered and reſolved by the two Chief Juſtices and the Chief Baron, and the Court of Wards, That the finding of an Office is not any eſtoppel, for that is but an enqueſt of Office, and the party grieved ſhall have a Traverſe to it, as it hath been confeſſed, and therefore without queſtion the ſame is no eſtoppel; But when an Office is found falſly, that Land is holden of the King by Knights ſervice in capite, or of the King himſelf in Socage, if the Heir ſueth a generall Livery, now it is holden in 46 E. 3. 12. by Moowbray and Perſey, that he ſhall not after add, that the Land is not holden of the King,

King; but that is not any eſtoppel to the Heir himſelf who ſueth the Livery, and ſhall not conclude his Heir: for ſo ſaith Mowbray himſelf expreſly in 44 Aſſiſ. pl. 35. That an Eſtoppel by ſuing of Livery ſhall eſtop onely himſelf the Heir during his life: And in 1 H. 4. 6. b. there the caſe is put of expreſs confeſſion and ſuing of Livery by the iſſue in tayl upon a falſe Office: and there it is holden, that the Jurors upon a new Diem clauſit extremum, after the death of ſuch ſpecial Heir, are at large, according to their conſcience, to finde that the Land is not holden, &c. for they are ſworn ad veritatem dicendum: and their finding in called veredictum, quaſi dictum veritatis; which reaſon alſo ſhall ſerve, when the Heir in Fee-ſimple ſueth Livery upon a falſe Office, and the Jurors after his death ought to find according to the truth: So it is ſaid 33 H. 6. 7. by Laicon, that if two ſiſters be found Heirs, whereof the one is a Baſtard, if they joyn in a Suit of Livery, the which joyneth with the Baſtard in the Livery, ſhall not alledg Baſtardy in the other: but there is no Book that ſaith, that the Eſtoppel ſhall endure longer than during his life: and when Livery is ſued by a ſpecial Heir, the force and effect of the Livery is executed and determined by his death, and by that the Eſtoppel is expired with the death of the Heir; but that is to be intended of a general Livery: but a ſpecial Livery ſhall not conclude one: But as it is expreſſed, the words of a general Livery are; When the Heir is found of full age: Rex Eſchaetori, &c. Scias quod cepimus homagium J. filii & haeredis B. defuncti de omnibus terris & tenementis quæ idem B. Pater ſuus tenuit de nobis in capite, die quo obiit, & ei terras & tenement. illa reddidimus, ideo tibi præcipimus, &c. And when the Heir was in Ward, at his full age, the Writ of Livery ſhall ſay, Rex, &c. Quia J. filius & hæres B. defuncti qui de nobis tenuit in capite ætatem ſuam coram te ſufficienter probavit, &c. Ceperimus homagium ipſius J. de omnibus terris & tenementis, quæ idem B. Pater ſuus tenuit de nobi in capite die quo obiit, & ei terras & tenement. illa reddidimus, & ideo tibi præcipimus, ut ſupra, &c. Which Writ is the Suit of the Heir, and therefore although that all the words of the Writ are the words of the King, as all the Writs of the King are; and although that the Livery be general, de omnibus terris & tenementis de quibus B. pater J. tenuit de nobis in capite die quo obiit, without direct affirmation that any Manor in particular is holden in capite, and notwithſtanding that the ſame is not at the proſecution of the Kings Writ, and no judgment upon it; yet becauſe the general Livery is founded upon the Office, and by the Office it was found, That divers Lands or Tenements were holden of the King in capite, for this cauſe the ſuing of the Writ ſhall conclude the Heir onely which ſueth the Livery, and after his death the Jurors in a new Writ of Diem clauſit extremum, are at large, as before is ſaid. And if that Jury find falſly in a Tenure of the King alſo, the Lord of whom the Land is holden may traverſe that Office: Or if Land be holden of the King, &c. in Socage, the Heir may traverſe the laſt Office, for by that he is grieved onely; and he ſhall not be driven to traverſe the firſt Office: and when the Father ſueth Livery, and dyeth, the concluſion is executed and paſt, as before is ſaid. And note, that there is a ſpecial Livery, but that proceeds of the Grace of the King, and is not the Suit of the Heir, and the King may grant it either at full age, before ætate probanda, &c. or to the Heir within age, as it appeareth in 21 E. 3. 40. And that is general, and ſhall not comprehend any Tenure, as the general Livery doth, and therefore it is not any

eſtoppel

eſtoppel without queſtion. And at the Common Law, a ſpecial Livery might have been granted before any Office found; but now by the Statute of 33 H. 8. cap. 22. it is provided, That no perſon or perſons, having Lands or Tenements above the yearly value of 20 l. ſhall have or ſue any livery, before inquiſition or Office found, before the Eſcheator or other Commiſſion: But by an expreſs clauſe in the ſame Act, Livery may be made of the Lands and Tenements compriſed or not compriſed in ſuch Office; ſo that if Office be found of any parcel, it is ſufficient: And if the Land in the Office doth exceed 20 l. then the Heir may ſue a general Livery after Office thereof found, as is aforeſaid: but if the Land doth not exceed 5 l. by the year, then a general Livery may be ſued without Office by Warrant of the Maſter of the Wards, &c. Sir 23 Eliz Dyer. 177. That the Queen ex debito Juſtitiæ is not bound at this day, after the ſaid Act of 33 H. 8. to grant a ſpecial Livery; but it is at her election to grant a ſpecial Livery, or to drive the Heir to a general Livery.

It was alſo reſolved in this Caſe, That the Office of 35 H. 8. was not traverſable, for his own Traverſe ſhall prove, that the King had cauſe to have Wardſhip by reaſon of Ward: And when the King cometh to the poſſeſſion by a falſe Office, or other means, upon a pretence of right, where in truth he hath no right, if it appeareth that the King hath any other right or intereſt to have the Land there, none ſhall traverſe the Office or Title of the King, becauſe that the Judgment in the Traverſe is, Ideo conſideratum eſt, quod manus Domini Regis à poſſeſſione amoveantur, &c. which ought not to be, when it appeareth to the Court, that the King hath right or intereſt to have the Land, and to hold the ſame accordingly: Sir 4 H 4. fo. 33. in the Earl of Kents Caſe, &c.

XXIX. Mich. 7 Jacobi Regis.

NOte; The Priviledg, Order, or Cuſtom of Parliament, either of the Upper Houſe, or of the Houſe of Commons, belongs to the determination or deciſion onely of the Court of Parliament: and this appeareth by two notable Precedents: Parliament.

The one at the Parliament holden in the 27 year of King Henry the ſixth, There was a Controverſie moved in the Upper Houſe between the Earls of Arundel and of Devonſhire, for their ſeats, places, and preheminences of the ſame, to be had in the Kings preſence, as well in the High Court of Parliament, as in his Counſels, and elſewhere: The King, by the advice of the Lords ſpiritual and temporal, committed the ſame to certain Lords of Parliament, who for that they had not leiſure to examine the ſame, it pleaſed the King, by the advice of the Lords at this Parliament, in anno 27 of his Reign, That the Judges of the Land ſhould hear, ſee, and examine the Title, &c. and to report what they conceive herein: The Judges made report as followeth; That this matter (viz. of Honor and precedency between the two Earls, Lords of Parliament) was a matter of Parliament, and belonged to the Kings Highneſs, and the Lords ſpiritual and temporal in Parliament, by them to be decided and determined; yet being there ſo commanded, they ſhewed what they found upon examination, and their Opinions thereupon.

Another Parliament in 31 H. 6. which Parliament begun the ſixth of

of March, and after it had continued some time, it was prorogued until the fourteenth of February: and afterwards in Michaelmas Term, anno 31 H. 6. Thomas Thorp, the Speaker of the Commons House, at the suit of the Duke of Buckingham, was condemned in the Exchequer in 1000 l. damages for a Trespass done to him: The 14 of February, the Commons moved in the Upper House, That their Speaker might be set at liberty, to exercise his place: The Lords refer this case to the Judges, and Fortescue and Prisot, the two chief Justices, in the name of all the Judges, after said consideration and mature deliberation had amongst them, answered and said, That they ought not to answer to this question, for it hath not been used aforetime, That the Justices should in any wise determine the Priviledg of this High Court of Parliament; for it is so high and mighty in its nature, that it may make Laws; and that that is law, it may make no Law: and the determination and knowledg of that Priviledg belongeth to the Lords of the Parliament, and not to the Justices: But as for proceedings in the lower Courts in such cases, they delivered their Opinions. And in 12 E. 4. 2. in Sir John Pastons case, it is holden, that every Court shall determine and decide the Priviledges and Customs of the same Court, &c.

XXX. Hilary Term, 7 Jacobi Regis: In the Star-Chamber.

Heyward and Sir John Whitbrokes Case.

IN the Case between Heyward and Sir John Whitbroke in the Star-Chamber, the Defendant was convicted of divers Misdemeanors, and Fine, and Imprisonment imposed upon him, and damages to the Plaintiff: and it was moved that a special Process might be made out of that Court to levy the said damages upon the Goods and Lands of the Defendant: and it was referred to the two chief Justices, whether any such Process might be made? who this Term moved the Case to the chief Baron, and to the other Judges and Barons; and it was unanimously resolved by them, That no such Process could or ought to be made, neither for the damages nor for the costs given to the Plaintiff: for the Court hath not any power or Jurisdiction to do it, but onely to keep the Defendant in prison until he pay them. For, for the Fine due to the King, the Court of Star-Chamber cannot make forth any Process for the levying of the same, but they estreat the same into the Exchequer, which hath power by the Law to writ forth Process to the Sheriff to levy the same. But if a man be convicted in the Star-Chamber for Forgery upon the Statute of 5 Eliz. that in that case, for the double costs and damages, that an English Writ shall be made, directed to the Sheriff, &c. reciting the conviction, and the Statute for the levying of the said costs and damages of the goods and chattels, and profits of the Lands of the Defendant, and to bring in the mony into the Court of Star-Chamber, and the Writ shall be sealed with the great Seal, and the Test of the King: For the Statute of 5 Eliz. hath given Jurisdiction to the Court of Star-Chamber, and power to give Judgment (amongst other things) of the costs and damages, which being given by force of the said Act of Parliament, by consequence

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the Court by the Act hath power to grant Execution; Quia quando aliquid conceditur, ei omnia concedi videntur per quæ devenitur ad illud. And it was reſolved, That the giving of the damages to the Plaintiff was begun but of late times: and although that one or two Precedents were ſhewed againſt this Reſolution, they being againſt the Law, the Judges had not any regard to them. The like Reſolution was in the Caſe of Langdale in that Court.

XXXI. Hilary Term, 7 Jacobi Regis: In the Common-Pleas.

Morſe and Webbs Caſe.

IN a Replevin brought by John Morſe againſt Robert Webb of the taking of two Oxen the laſt day of November in the third year of the Reign of the King that now is, in a place called the Downfield in Luddington in the County of Worceſter: The Defendant, as Bayliff to William Sherington, Gent. made Conuſance, becauſe that the place where is an Acre of Land which is the Freehold of the ſaid William Sherington, and for damage-feaſants, &c. In Bar of which Avowry the Plaintiff ſaid, That the ſaid Acre of Land is parcel of Downfield, and that he himſelf, at the time, and before the taking, &c. was and yet is ſeiſed of two yard Land, with the appurtenances, in Luddington aforeſaid: And that he, and all thoſe whoſe Eſtate he hath in the ſaid two yards of Land, time out of minde, &c. have uſed to have Common of paſture per totum contentum of the ſaid place called the Downfield, whereof, &c. for four Beaſts called Rother Beaſts, and two Beaſts called Horſe-beaſts, and for ſixty Sheep, at certain times and ſeaſons of the year, as to the ſaid two yard Lands, with the appurtenances appertaining: and that he put in the ſaid two Oxen to uſe his Common, &c. And the Defendant did maintain his Avowry, and traverſed the Preſcription, upon which the parties were at iſſue, and the Jury gave a ſpecial Verdict, That before the taking, one Richard Morſe, Father of the ſaid John Morſe, and now Plaintiff, whoſe Heir he is, was ſeiſed of the ſaid two yards Land, and that the ſaid Richard Morſe, &c. had the Common of Paſture for the ſaid Chattel, per totum contentum of the ſaid Downfield, in manner and form as before is alledged, and ſo ſeiſed; The ſaid Richard Morſe, in the twentieth year of Queen Elizabeth, demiſed to William Thomas and John Fiſher divers parcels of the ſaid two yard Lands, to which, &c. viz. the four Buts of arable, with the Common and intercommon to the ſame belonging, for the term of four hundred years; by force of which the ſaid William Thomas and John Fiſher entred, and were poſſeſſed: and the ſaid Richard ſo ſeiſed, died thereof ſeiſed; by which the ſaid two yard Lands in poſſeſſion and Reverſion deſcended to the ſaid John Morſe the now Plaintiff: And if upon the whole matter, the ſaid John Morſe now hath, and at the time of the taking, &c. had Common of Paſture, &c. for four Beaſts called Rother Beaſts, and two Beaſts called Horſe-Beaſts, and for ſixty Sheep, &c. as to the ſaid two Acres of Land, with the appurtenances belonging, in Law or not, the Jury prayed the advice of the Court.

Note, that this Plea began Trin. 5 Jacobi, Rot. 1405. And upon

Argument at the Bar, and at the Bench, it was resolved by the whole Court, that it ought to be found against the Defendant, who had traversed the Prescription: For although that all the two yard Lands had been demised for years, yet the Prescription made by the Plaintiff is true; for he is seised in his Demesn as of Fee of the Freehold of the two yards of Land, to which, &c. And without question the Inheritance and freehold of the Common, after the years determined, is appendant to the said two yard Lands; and therefore clearly the issue is to be found against the Defendant: But if he would take advantage of the matter in Law, he ought (confessing the Common) to have pleaded the said Lease; but when he traverseth the Prescription, he cannot give the same in evidence.

2. It was resolved, That if the said Lease had been pleaded, that the Common, during the Lease for years, is not suspended or discharged; for each of them shall have Common Rateable, and in such manner, that the Land in which, &c. shall not be surcharged: and if so small a parcel be demised, which will not keep one Ox, nor a Sheep, then the whole Common shall remain with the Lessor, so always as the Land in which he not surcharged.

3. It was resolved, That Common appendant unto Land, is as much as to say, Common for Cattel levant and couchant upon the Land in which, &c. So that by the severance of part of the Land to which, &c. no prejudice can come to the Terre-tenant in which, &c.

4. See the Case of in the fourth part of my Reports, fo. was affirmed for good Law: and there is no difference, when the Prescription is for Cattel levant and couchant, and for a certain number of Cattel levant and couchant: But when the Prescription is for Common appurtenant to Land without (alledging that it is for Cattel levant and couchant) there a certain number of the Cattel ought to be expressed, with are intended by the Law to be levant and couchant.

XXXII. Hil. 7 Jacobi Regis: In the Common-Pleas.

Hughes and Crowthers Case.

IN a Replevin, between Robert Hughs Plaintiff, and Richard Crowther Defendant, which began, Trin. 6 Jacobi, Rot. 2220. The Case was, that Charles Fox was seised of 11 acres of Meadow in Bedston, in the County of Salop, in Fee, and 10 Octob. 9 Eliz. leased the same to Charles Hibbens, and Arthur Hibbens for 60 years, if the aforesaid Charles Hibbens and Arthur Hibbens should so long live, and afterward Charles died; and if the Lease determine by his death was the Question, and it was adjudged, That by his death the Lease was determined; for the life of a man is meer collateral unto the Estate for years: otherwise it is, if a Lease be made to one for the lives of J. S. and J. N. there the Freehold doth not determine by the death of one of them, for the reasons and causes given in the Case of Brudnel, in the fifth part of my Reports, fo. 9. Which Case was affirmed to be good Law by the whole Court.

Easter

XXXIII. Eaſter Term, anno 8 Jacobi: In the Common-Pleas.

Heydon and Smiths Caſe.

RIchard Heydon brought an Action of Treſpaſs againſt Michael Smith and others, of breaking of his Cloſe called the Moor in Ugley in the County of Eſſex, the 25 day of June in the fifth year of the King, & quandam arborem ſuam ad valentiam 40 s. ibidem nuper creſcen. ſuccidérunt: The Defendants ſaid, that the Cloſe is, and at the time of the Treſpaſs was the Freehold of Sir John Leventhrop Knight, &c. and that the ſaid Oak was a Timber Tree of the growth of thirty years and more, and juſtifies the cutting down of the Tree by his commandment: The Plaintiff replyeth and ſaith, That the ſaid Cloſe, and a Houſe, and 28 Acres of Land in Ugley, are Copyhold, and parcel of the ſaid Mannor of Ugley &c. of which Mannor Edward Leventhrop Eſquire, Father of the ſaid Sir John Leventhrop, was ſeiſed in Fee, and granted the ſaid Houſe, Lands and Cloſe to the ſaid Richard Heydon and his Heirs by the Rod at the Will of the Lord, according to the cuſtom of the ſaid Mannor: and that within the ſaid Mannor there is ſuch a cuſtom, Quod quilibet tenens Cuſtomar. ejuſdem Manerii ſibi, & hæredibus ſuis, ad voluntatem Domini, &c. à toto tempore ſupradicto uſus fuit, & conſuevit ad ejus libitum amputare ramos omnimodarum arborum, called Pollingers, or Yusbords, ſuper terris & tenem. ſuis Cuſtomar. creſcen. pro ligno combuſtibili, ad ſuke libitum ſuum applicand. & in prædicto Meſſuagio comburend. and alſo to cut down and take at their pleaſure all manner of Trees called Pollengers or Yusbords, and all other Timber Trees, ſuper ejuſdem Cuſtumariis ſuis creſcen. for the reparation of their Houſes built upon the ſaid Lands and cuſtomary Tenements; and alſo for Ploughbote and Cartbote; and that all Trees called Pollengers or Yusbords, and all other trees at the time of the Treſpaſs aforeſaid, or hitherto growing upon the aforeſaid Lands and Tenements cuſtomary of the ſaid Richard Heydon, were not ſufficient, nor did ſerve for the neceſſary uſes aforeſaid: And that the ſaid Richard Heydon, from the time of the ſaid Grant made unto him, had maintained and preſerved all trees, &c. growing upon the ſaid Lands and Tenements to him granted: And that after the death of the ſaid Edward Leventhrop, the ſaid Mannor deſcended to the ſaid Sir John Leventhrop: and that at the time of the Treſpaſs the aforeſaid Meſſuage of the ſaid Richard Heydon was in decay, & egebat neceſſariis reparationibus in Maremio ejuſdem. Upon which the Defendant did demur in Law.

And this Caſe was oftentimes argued at the Bar: and now this Term it was argued at the Bench by the Juſtices: And in this caſe theſe points were reſolved.

1. That the firſt part of the Cuſtom was abſurd and repugnant, ſcil. Quod quilibet tenens Cuſtomarii ejuſdem Manerii habens & tenens aliqua

terras ſeu tenementa Cuſtom. &c. uſus fuit amputare ramos omnimodarum arborum, vocat. Pollingers, &c. pro ligno combuſtibili, &c. in prædicto Meſſuagio comburend. (which ought to be in the Meſſuage of the Plaintiff, for no other Meſſuage is mentioned before) which is abſurd and repugnant, That every cuſtomary Tenant ſhould burn his Fuel in the Plaintiffs houſe: But that Branch of the Cuſtom doth not extend unto this caſe: for the laſt part of the cuſtom, which concerneth the cutting down of the Trees, concerns the point in queſtion; and ſo the firſt part of the cuſtom is not material.

It was objected, That the pleading, that the Meſſuage of the Plaintiff was in decay, & egebat neceſſariis reparationibus in maremio ejuſdem, was too general: for the Plaintiff ought to have ſhewed in particular, in what the Meſſuage was in decay: as the Book is in 10 E. 4 3. He who juſtifieth for Houſebote, &c. ought to ſhew that the Houſe hath cauſe to be repaired, &c.

To which it was anſwered by Coke chief Juſtice, That the ſaid Book proved the pleading in the caſe at Bar was certain enough, ſcil. Quod Meſſuagium præd. egebat neceſſariis reparationibus in maremio, without ſhewing the præciſe certainty: and therewith agrees 7 H. 6. 38. and 34 H. 6. 17.

2. It was alſo anſwered and reſolved, That in this caſe without queſtion it needs not to alledg more certainty, for here the Copyholder according to the cuſtom doth not take it, but the Lord of the Mannor doth cut down the Tree, and carryeth it away where the reſt was not ſufficient, and ſo preventeth the Copyholder of his benefit, and therefore he needeth not to ſhew any decay at all, but onely for increaſing of the damages, for the Lord doth the wrong when he cutteth down the Tree which ſhould ſerve for reparations when need ſhould be.

3. It was reſolved, That of common Right, as a thing incident to the Grant, the Copyholder may take Houſebote, Hedgbote, and Plowbote upon his Copyhold: Quia conceſſo uno conceduntur omnia ſine quibus id conſiſtere non poteſt: Et quando aliquis aliquid concedit, concedere videtur & id ſine quo res ipſa eſſe non poteſt: and therewith agreeth 9 H. 4. Waſte 59. But the ſame may be reſtrained by cuſtom, ſcil. That the Copyholder ſhall not take it unleſs by aſſignment of the Lord or his Bayliff, &c.

4. It was reſolved, That the Lord cannot take all the Timber Trees, but he ought to leave ſufficient for the Reparation of the Cuſtomary houſes, and for Ploughbote, &c. for otherwiſe great Depopulation will follow; ſcil. Ruine of the Houſes, and decay of Tillage and Huſbandry. And it is to be underſtood, That Bote being an ancient Saxon word, hath two ſignifications; the one compenſatio criminis, as Frithbote, which is as much as to ſay, to be diſcharged from giving amends for the breach of the peace; Manbote, to be diſcharged of amends for the death of man: And ſecondly, in the latter ſignification, (ſcil.) for Reparation, as was Bridgbote, Burghbote, Caſtlebote, Parkbote, &c. ſcil. Reparation of a Bridg, of a Borough, of a Caſtle, of a Park, &c. And it is to be known, that Bote and Eſtovers are all one: Eſtovers are derived of this French word, Eſtover, i. e. fovere; i. e. to keep warm, to cheriſh, to ſuſtain, to defend: And there are four kinds of Eſtovers, (ſcil.) ardendi, arandi, conſtruendi, & claudendi: (ſcil.) Firebote, Houſebote, Ploughbote, and Hedgbote.

5. It was reſolved, That the Copyholder ſhall have a general Action of Treſpaſs againſt the Lord, Quare clauſum fregit, & arborem ſuam,

ſuam, &c. ſuccidit; for Cuſtom hath fixed it to his Eſtate againſt the Lord: and the Copyholder in this caſe hath as great an intereſt in the Timber Trees, as he hath in his Meſſuage which he holdeth by Copy: and if the Lord breaketh or deſtroyeth the Houſe, without queſtion the Copyholder ſhall have an Action of Treſpaſs againſt his Lord, Quare Domum fregit, and by the ſame reaſon for the Timber Trees which are annexed to the Land, and which he may take for the Reparation of his Copyhold Meſſuage, and without which the Meſſuage cannot ſtand. Trinit. 40 Eliz. Rot. 37. in the Kings-Bench, between Stebbing and Groſener, The Cuſtom of the Mannor of Netherhall in the County of Suffolk was, that every Copyholder might lop the Pollengers upon his Copyhold pro ligno combuſtibili, &c. And the Lord of the Mannor cut down the Pollingers, being upon the Plaintiffs Copyhold, upon which he brought his Action upon the caſe, becauſe that the lops of the Trees in ſuch caſe did belong to the Copyholder, and they were taken by the Lord. See Taylors caſe in the fourth part of my Reports 30 and 31. and ſee 5 H. 4. 2. Guardian in Knight-ſervice, who hath Cuſtodiam terræ, ſhall have an Action of Treſpaſs for cutting down the Trees againſt the Heir who hath the inheritance: Vide 2 H. 4. 12. A Copyholder brought an Action of Treſpaſs, Quare clauſum fregit, & arbores ſuccidit: and ſee 2 E. 4. 15. A Servant who is commanded to carry goods to ſuch a place, ſhall have an Action of Treſpaſs or Appeal: 1 H. 6. 4. 7 H. 4. 15. 19 H. 6. 34. 11 H. 4. 28. If after taking the goods, the owner hath his goods again, yet he ſhall have a general Action of Treſpaſs, and upon the evidence the damages ſhall be mitigated: ſo is the better Opinion in 11 H. 4. 23. That he who hath a ſpecial property of the goods at a certain time, ſhall have a general Action of Treſpaſs againſt him who hath the general property, and upon the evidence damages ſhall be mitigated; but clearly, the Bayliff, or he who hath a ſpecial property, ſhall have a general Action of Treſpaſs againſt a ſtranger, and ſhall recover all in damages, becauſe that he is chargeable over. See 21 H. 7. 14. b. acc. And it is holden in 4 H. 7. 3. That Tenant at ſufferance ſhall have an Action of Treſpaſs in reſpect of the poſſeſſion, and if the Defendant plead Not-guilty, but he cannot make title, 30 H. 6. Treſpaſs 10. 15 H. 7. 2. the King, who hath profits of the Land by Out-lawry, ſhall have an Action of Treſpaſs, or take goods damage-feaſants: 35 H. 6. 24. 30 H. 6. Treſp. 10. &c. Tenant at will ſhall have an Action of Treſpaſs: 21 H. 7. 15. and 11 H. 4. 23. If a man Bayl goods which are taken out of his poſſeſſion, if the Bayliff recover in Treſpaſs, the ſame ſhall be a good Bar to the Bayliff: 5 H. 4. 2. In a Writ of Waſte brought againſt Tenant for life, and aſſigned the Waſte in cutting down of Trees: the Defendant pleaded in Bar, that the Plaintiff himſelf cut them: and Culpeper, the Serjeant of the Plaintiff, objected againſt it, that it ſhould be no Plea, becauſe the Defendant had not any thing in the Freehold, no more than a meer ſtranger; and if a ſtranger had cut down the ſame Trees, he ſhould be chargeable in Waſte.

Alſo in this caſe, we ſhould be at a miſchief if we ſhould not recover againſt him; for if at another time he bringeth an Action of Treſpaſs againſt us, he ſhall recover damages againſt us for the cutting, id eſt, for the value of the Trees: and yet it was holden by the Court, that the ſame was a good Bar: And it was ſaid by the Court that the Plaintiff was not at any miſchief in this caſe: for in as much as the Defendant

ſhall

shall have advantage now to discharge himself of Waste against the Plaintiff, upon this matter he shall be barred for ever of his Action of Trespass, scil. to recover the value of the Trees, which was the mischief objected by Culpeper: But without question he shall have an Action of Trespass, Quare clausum fregit, for the Entry of the Lessor and for the cutting of the Trees, but he shall not recover the value of the Trees, because he is not chargeable over, but for the special loss which he hath, scil. for the loss of the Pawnage and of the shadow of the Trees, &c. See Fitz. Trespass ultimo, in the Abridgment: And afterwards, the same Term, Judgment was given on the principal case for the Plaintiff.

XXXIV. Easter Term, 8 Jacobi: In the Common-Pleas.

THe Parishioners of St. Alphage in Canterbury by custom ought to chuse the Parish-Clark, whom they chose accordingly: The Parson of the Parish, by colour of a new Canon made at the Convocation in the year of the King that now is (which is not of force to take away any Custom) drew the Clark before Doctor Newman, Official of the Archbishop of Canterbury, to deprive him, upon the point of the right of Election, and for other causes; and upon that it was moved at the Bar to have a Prohibition: And upon the hearing of Doctor Newman and himself, and his Councel, a Prohibition was granted by the whole Court, because the party chosen is a meer temporal man, and the means of choosing of him, scil. the custom, is also meer temporal, so as the Official cannot deprive him; but upon occasion the Parishioners might displace him; And this Office is like to the Office of a Churchwarden, who although they be chosen for two years, yet for cause they may displace them, as it is holden in 26 H. 8. 5. And although that the execution of the Office concerneth Divine Service, yet the Office it self is meer temporal: See 3 E. 3. Annuity 30. He who is Clark of a Parish is removable by the Parishioners: See 18 E. 3. 27. A gift in tayl was made of the Serjanty or Clarkship of the Church of Lincoln, and there adjudged, that the Office is temporal, and shall not be tryed in the Ecclesiastical Court, but in the Kings Court: And it is to be known, that the deprivation of a man of a temporal Office, or place, is a temporal thing, upon which no Appeal lyeth by the Statute of 25 H. 8. but an Assise, as in 4 Eliz. Dyer 209. The President of Magdalen Colledg in Oxford was deprived of the Bishop of Winchester their Visitor; He shall not have an Appeal to the Delegates, for the Deprivation is temporal, and not spiritual; but he may have an Assise: and therewith agreeth the Book of 8 Ass. Siracses Case: But if a Dean of a Cathedral Church, of the Patronage of the King, be deprived before the Commissioners of the King, he may appeal to the Delegates within the said Act of 25 H. 8. For a Deanry is a spiritual promotion, and not temporal: and before the said Act, in such case, the Appeal was to Rome immediately.

Mich.

XXXV. Mich. Term, 5 Jacob. Rot. 30. In the Kings-Bench.

Prichard and Hawkins Case.

JOhn Prichard brought an Action upon the Case against Robert Hawkins for slanderous words published the last day of August in the third year of the King, viz. That Prichard which serveth Mistris Shelley did murder John Adams Child, (Quandam Isabellam Adams modo defunct. filiam cujusdam Johannis Adams, of Williamstre in the County of Glocester, innuendo) upon which a Writ of Error was brought in the Exchequer Chamber upon a Judgment given for Prichard in the Kings-Bench: and the Judgment was reversed in Easter Term, 7 Jacobi, because that it doth not appear, that Isabel was dead at the time of the speaking the words, for tunc defunct. ought to have been in the place of modo defunct.

XXXVI. Easter Term, 8 Jacobi: In the Kings-Bench.

Dison and Bestneys Case.

HUmphrey Dison said of Nicolas Bestney, utter Barester and Counceilor of Grays-Inn, Thou a Barester? Thou art no Barester, thou art a Barretor; Thou wert put from the Bar, and thou darest not shew thy self there. Thou study Law? Thou hast as much wit as a Daw. Upon Not-guilty pleaded, the Jury found for the Plaintiff, and assessed damages to 23 l. upon which Judgment was given: and in a Writ of Error in the Exchequer Chamber, the Judgment was affirmed.

XXXVII. Easter Term, 8 Jacobi Regis: In the Kings-Bench.

Smith and Hills Case.

NOah Smith brought an Action of Assault and Battery against Walter Hill in the Kings-bench, which began Pasch. 7 Jacobi, Rot. 175. upon Not-guilty pleaded, a Verdict and Judgment was for the Plaintiff, and 107 l. assessed for damages and costs. In a Writ of Error brought in the Exchequer Chamber, the Error was assigned in the Venire facias, which was certified by Writ of Certiorari: and upon the Writ no Return was made upon the back of the Writ, which is called Returnum album; and for that cause, this Easter Term the Judgment was reversed.

Trinity

XXXVIII. Trinity Term, 7 Jacobi: In the Court of Wards.

Westcots Case.

IT was found by a Writ of Diem clausit extremum, after the death of Roger Westcot, That the said Roger the day that he dyed was seised of and in the moyety of the Mannor of Trewalliard in his Demesn as of Fee, and of such his Estate dyed thereof seised: and that the moyety of the said Mannor, anno 19 E. 3. was holden of the then Prince, as of his Castle of Trematon, parcel of his Dutchy of Cornwall, by Knights-service, as it appeareth by a certain exemplification of Trematon for the same Prince, made 9 Marcii, 19 E. 3. And the words of the Extent were, Willielmus de Torr tenet duo feoda & dimid. militis apud Pick, Strikleſtomb, & Trewalliard, per servitium militare, & reddit inde per annum 8 d. And it was resolved by the two chief Justices and the chief Baron, That the Office concerning the Tenure was insufficient and void, because that the Verdict of a Jury ought to be full and direct, and not with a prout patet, for by that the whole force of the Verdict relyeth onely upon the Extent, which if it be false, he who is grieved shall have no remedy by any Traverse; for they have not found the Tenure indefinite which might be traversed, but with a prout patet, which makes the Office in that point insufficient, and upon that a Melius inquirendum shall issue forth: and therewith agreeth F. N. B. 255. that a Melius inquirendum shall be awarded in such a Case.

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